Supreme Court, U. S.
FILED
OCT 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

v.

DAVID L. RICE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

WILLIAM C. CUNNINGHAM, S.J.
801 Ladera Lane
Santa Barbara, California 93108

J. PATRICK GREEN
707 City National Bank Building
Omaha, Nebraska 68102
Telephone: (402) 341-4018

Washington, D.C. • CLB PUBLISHERS' ↄ LAW PRINTING CO. • (202) 393-0625

INDEX

Page

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 8

SUMMARY OF THE ARGUMENT 18

ARGUMENT:

I. THE MODIFICATIONS OF THE EXCLUSIONARY RULE WHICH NEBRASKA PROPOSES, WOULD SUBSTANTIALLY THWART THE OPERATION OF THAT RULE AND LEAVE FOURTH AMENDMENT RIGHTS WITHOUT REMEDIAL PROTECTION. IF THE FOURTH AMENDMENT IS TO BE MORE THAN A FORM OF WORDS, THESE MODIFICATIONS SHOULD BE REJECTED. IN ANY EVENT, THE PROPOSED MODIFICATIONS HAVE NO RELEVANCE TO THE FACTS OF THIS CASE AND HENCE WOULD NOT SAVE THE SEARCH 28

A. To Make The Operation Of The Exclusionary Rule Depend Upon The Absence Of Good Faith On The Part Of Police Officers Would Substantially Diminish The Deterrent Effect Of The Exclusionary Rule. In Any Event, The Evidence Here Does Not Demonstrate That The Police Acted In Good Faith 41

B. To Allow Supplementation Of A Defective Affidavit For A Search Warrant In A Subsequent Hearing On A Motion To Suppress Would Amount To An Elision Of The Warrant Clause From The Fourth Amendment. In Any Event, The Additional Information Upon Which Nebraska Relies Does Not Establish Probable Cause 57

C. The Proposed Reasonableness Under The Circumstances Test, Which Would Not Require The Police To Have Probable Cause Before They Made Entry To Search, Would Totally Eviscerate The Protection Of Privacy Provided By The Fourth Amendment. In Any Event, The State's Argument That The Police Search Here Was Reasonable Has No Basis In The Facts 69

II. THE COURTS BELOW CORRECTLY HELD THAT RICE HAD EXHAUSTED HIS STATE REMEDIES ON THE ISSUE OF POSSIBLE JUSTIFICATIONS OF THE SEARCH AT 2816 PARKER BECAUSE OF EXIGENT CIRCUMSTANCES OR THE POSSESSION BY THE POLICE OF AN ARREST WARRANT FOR DUANE PEAK 74

III. THE DISTRICT COURT HAD JURISDICTION UNDER 28 U.S.C. §§2254 TO ENTERTAIN RICE'S PETITION FOR HABEAS CORPUS AND TO GRANT HIM THE RELIEF WHICH HE SOUGHT 76

A. Adoption Of The Fair Opportunity Limitation On Federal Habeas In Search and Seizure Cases Would Constitute An Impermissible Interference With The Legislative Authority Of Congress. If Such A Change In The Historic Reach Of Federal Habeas Is To Be Made, The Change Should Emanate From Congress 78

1. The Original History and Subsequent Evolution of §§2254 Fully Support The Jurisdiction Of The District Court Over A State Petitioner's Habeas Corpus Action Grounded Upon A Claim Of Improper Denial Of The Suppression Remedy 80

2. The Modern Scope Of Federal Habeas Corpus, Which Includes Within Its Zone State Search and Seizure Cases, Is Fully Consistent With The Historic Understanding Of The Writ At The Time The Constitution Was Adopted 91

3. The Policies Which Underpin The Extension Of Federal Habeas Corpus Jurisdiction To State Prisoners Fully Support The Application Of That Jurisdiction To Cases In Which The Petitioner Claims That His Conviction Was Procured Because Of A Misapplication Of Fourth Amendment Learning 97

B. The Removal Of Search and Seizure Questions From The Scope Of Federal Habeas Corpus Would Substantially Diminish The Deterrent Effect Of The Exclusionary Rule 108

C. Any Change In The Scope Of Federal Habeas Should Be Applied Prospectively Only 120

CONCLUSION 120

CASES CITED

Cases: *Page*

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 37

Aguilar v. Texas, 378 U.S. 108 (1964) 119

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 20, 39, 64

Blue Chip Stamps v. Manor Drug Stores, 43 Law Week, 4707 (1975) 103, 106

Brinegar v. United States, 338 U.S. 160 (1949) 51, 68

Brown v. Allen, 344 U.S. 443 (1953) ..... *passim*

Brown v. Illinois, 43 Law Week 4937 (1975) 40, 42, 62, 64

Burnside v. Nebraska, 346 F.2d 88 (8th Cir. 1965) 77, 106

California v. Hurst, 325 F.2d 891 (9th Cir. 1963) 76

Callies v. State, 157 Neb. 640, 61 N.W.2d 370 (1953) 117

Camara v. Municipal Court, 387 U.S. 523 (1967) 19, 22, 70, 71

Carafas v. LaValle, 391 U.S. 234 (1968) 77

Carfer v. Caldwell, 200 U.S. 293 (1906) 77

Carroll v. United States, 267 U.S. 132 (1925) 22, 51, 70

Cohens v. Virginia, 6 Wheat. 264 (1821) 93

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 58

Dandridge v. Williams, 397 U.S. 471 (1970) 50

Elkins v. United States, 364 U.S. 206 (1960) 19, 33, 43, 50

Ex parte Bollman, 4 Cranch 75 (1807) 81

Ex parte Dorr, 3 How. 103 (1845) 81

Ex parte Lange, 18 Wall. 163 (1873) 90

Ex parte McCardle, 73 U.S. 318 (1868) 85

Ex parte Seibold, 100 U.S. 371 (1879) 90

Ex parte Watkins, 3 Pet. 193 (1836) 81

Fahey v. Mallonee, 332 U.S. 245 (1947) 59

Page

Fay v. Noia, 372 U.S. 391 (1963) ..... *passim*

Francisco v. Gathright, ___U.S.___, 42 L.Ed. 2d 226 (1974) 76

Frank v. Mangum, 237 U.S. 309 (1915) 113

Fuentes v. Shevin, 407 U.S. 67 (1972) 50, 60

Fugate v. Ronin, 167 Neb. 70, 91 N.W.2d 240 (1958) 117

Georgia v. United States, 411 U.S. 526 (1973) 103

Gerstien v. Pugh, ___U.S.___, 43 L.Ed. 2d 54 (1975) 59, 60

Gertz v. Welch, 418 U.S. 323 (1974) 46, 48, 50

Hall v. Warden, 313 F.2d 483 (4th Cir. 1963) 76

Halloway v. Wolff, 482 F.2d, 110 (8th Cir. 1973) 119

Hans Nielson, Petitioner, 131 U.S. 176 (1889) 90

Harris v. New York, 401 U.S. 222 (1971) 64

Henry v. Mississippi, 379 U.S. 443 (1965) 77, 106

Hester v. United States, 265 U.S. 57 (1924) 32, 70

Hubbard v. Tinsley, 336 F.2d 854 (10th Cir. 1964) 77

Humphrey v. Cady, 405 U.S. 504 (1972) 23, 75

Johnson v. United States, 333 U.S. 10, 14 (1948) 37, 58

Johnson v. Zerbst, 304 U.S. 458 (1938) 84, 90

Katz v. United States, 389 U.S. 347 (1967) 19, 31, 32, 58, 69

Katzenbach v. Morgan, 384 U.S. 641 (1966) 79, 107, 108

Kaufman v. United States, 394 U.S. 217 (1969) 24, 78, 115-116

Kirby v. Illinois, 406 U.S. 682 (1972) 63

Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) 51, 57, 114

LeDent v. Wolff, 460 F.2d 1001 (8th Cir. 1972) 119

Linkletter v. Walker, 381 U.S. 618 (1965) ..... *passim*

Losieau v. Sigler, 421 F.2d 825 (8th Cir. 1966) 117

Mancusi v. DeForte, 392 U.S. 364 (1968) 31, 69, 77

Page

Mansfield, C. & L.M.R.R. v. Swan, 111 U.S. 379 (1884) 77
Mapp v. Ohio, 367 U.S. 643 (1961) ..... *passim*
Marcus v. Search Warrant, 367 U.S. 717 (1961) 119
Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) 93
Matters v. Ryan, 249 U.S. 375 (1919) 77
McCray v. Illinois, 386 U.S. 300 (1967) 51
McCreary v. Nebraska, 86 S.Ct. 1877, 364 U.S. 979, 16 L.Ed. 2d 689 (1966) 119
McCreary v. Sigler, 406 F.2d 1264 (8th Cir. 1969) 119
McMann v. Richardson, 397 U.S. 759 (1970) 110
McNabb v. United States, 318 U.S. 332 (1943) 59
Michigan v. Tucker, 417 U.S. 433 (1974) 42,45,51
Mitchell v. W.T. Grant Co. 416 U.S. 600 (1974) 60
Moore v. Dempsey, 261 U.S. 86 (1923) 90,119
Mickey v. Mississippi, 292 U.S. 393 (1934) 59
North Georgia Finishing, Inc. v. Dichem, Inc., __U.S.__ 42 L.Ed. 2d 751 (1974) 60
Op Cotton Mills v. Administrator, Department of Labor, 312 U.S. 126 (1941) 59
Oregon v. Hass, 43 Law Week 4417 (1975) 64
Picard v. Conner, 404 U.S. 270 (1971) 23,75
Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) 119
Rice v. Wolff, 388 F.Supp. 185 (8th Cir. 1974) ..... *passim*
Rice v. Wolff, 513 F.2d 1280 (1975) 118
Roaden v. Kentucky, 413 U.S. 496 (1973) 58
Roberts v. Lavallee, 389 U.S. 40 (1967) 76
Rochin v. California, 342 U.S. 165 (1952) 103
Rogers v. Richmond, 365 U.S. 534 (1961) 103
Sanders v. United States, 373 U.S. 1 (1963) 75

Page

Scheuer v. Roads, 416 U.S. 232 (1974) 51
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) ..... *passim*
See v. Seattle, 387 U.S. 541 (1967) 31
Sgro v. United States, 287 U.S. 206 (1932) 66
Shadwick v. City of Tampa, 407 U.S. 345 (1972) 61
Simmons v. United States, 390 U.S. 377 (1968) 115
Sisck v. Lane, 331 F.2d 235 (7th Cir. 1964) 77
Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 60
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 107
Spinelli v. United States, 393 U.S. 410 (1969) 119
Stanford v. Texas, 379 U.S. 478 (1965) 119-120
Steffel v. Thompson, 415 U.S. 552 (1974) 82
State v. Bazis, 190 Neb. 586, 210 N.W.2d 919 (1973) 119
State v. Dussault, 193 Neb. 122, 225 N.W.2d 558 (1975) 119
State v. Glouser, 193 Neb. 190, 226 N.W.2d 328 (1975) 119
State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1970) 117
State v. Halloway, 187 Neb. 1, 187 N.W.2d 85 (1971) 119
State v. Howard, 184 Neb. 274, 167 N.W.2d 80 (1969) 119
State v. Huggins, 186 Neb. 704, 185 N.W.2d 849 (1971) 119
State v. Kallos, 193 Neb. 113, 225 N.W.2d 553 (1975) 119
State v. LeDent, 185 Neb. 380, 176 N.W.2d 21 (1970) 119
State v. McCreary, 179 Neb. 589, 139 N.W.2d 362 Cert. denied (1966) 119

Page

State v. Nydegger, 186 Neb. 61, 187 N.W.2d 892 (1970) 115

State v. Rice, 188 Neb. 728, 199 N.W.2d 480 (1972)

State v. Torrence, 192 Neb. 213, 219 N.W.2d 772 (1974) 119

State v. Waits, 185 Neb. 780, 178 N.W.2d 774 (1970) 119

Terry v. Ohio, 392 U.S. 11 (1968) 70

Thornton v. United States, 368 F.2d 822 (D.C. Cir. 1966) 77

Tollett v. Henderson, 411 U.S. 258 (1973) 110

Townsend v. Sain, 372 U.S. 293 (1963) 114

Treinies v. Sunshine Mining Co., 308 U.S. 66 (1940) 77

U.S. ex rel Anglet v. Fay, 333 F.2d 12 (2d Cir. 1964) 77

U.S. ex rel Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963) Aff. 381 U.S. 618 (1965) 76

United States v. Calandra, 414 U.S. 338 (1974) 34, 42, 64

United States v. Haley, 371 U.S. 18 (1962) 77

United States v. Hayman, 342 U.S. 205 (1952) 79, 84

United States v. Peltier, 43 Law Week 4918 (1975) 42, 45, 51

United States v. United States District Court, 407 U.S. 297 (1972) 21, 58

United States v. United States Gypsum Co. 333 U.S. 364 (1948) 114

United States v. Ventresca, 380 U.S. 102 (1965) 51, 114

United States v. Wade, 388 U.S. 218 (1967) 63

Vaughn v. Menlove, 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (1837) 44

Walker v. Johnston, 312 U.S. 275 (1941) 84

Waley v. Johnson, 360 U.S. 101 (1942) 90

Page

Warden v. Hayden, 387 U.S. 294 (1967) 77, 91

Warren v. United States, 311 F.2d 673 (8th Cir. 1963) 106

Wilson v. Porter, 361 F.2d 412 (9th Cir. (1966)) 77

Wilwording v. Swenson, 404 U.S. 249 (1971) 75

Wood v. Strickland, 43 Law Week 4293 (1975) 49, 50, 51, 115

Wyman v. James, 400 U.S. 309 (1971) 32

Yates v. United States, 354 U.S. 298 (1957) 67, 119

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 90

Zwickler v. Koota, 389 U.S. 241 (1967) 82

Constitutional Provisions and Statutes Cited:

Judiciary Act of 1789, 1 Stat. 81 ..... 80-81, 87

Habeas Corpus Act of 1867, 14 Stat. 385 Ch. 28, 1 (1867) ..... *passim*

U.S. Constitution, Article III 107

U.S. Constitution, Amend. I, IV, V, XI, and XIV ..... *passim*

28 U.S.C. §§2254 and §§2255 ..... *passim*

Texts and Articles Cited:

Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. of Penn. L. Rev. 793 (1965) ..... *passim*

Amsterdam, Perspectives on the Fourth Amendment 58 Minn. L. Rev. 349 (1974) ..... *passim*

Amsterdam, Search, Seizure and Section 2255; A Comment, 112 U. of Penn. L. Rev. 378 (1964) 89, 99, 101, 104

Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963) 79, 81, 88, 94, 100

Bender, The Retroactive Effect of an Overruling Constitutional Decision, Mapp v. Ohio, 100 U. of Penn. L. Rev. 650 (1962) 89

Page

Bloustein, Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. Rev. 962 (1964) 31

Bright, The Changing Nature of the Federal Appeals Process in the 1970's, 65 FRD 496 100

Chevigny, Police Power 62

Collings, Habeas Corpus for Convicts, Constitutional Right of Legislative Grace?, 40 Cal. L. Rev. 335 (1952) 79, 80, 88, 89

Comment, Proposed Modification of Federal Habeas Corpus for State Prisoners–Reformer Revocation, 61 Geo. A.J. 1221 (1973) 107

Cong. Globe, 39th Cong., 1st Session 32, 39 (July 27, 1866) 86

Cong. Globe, 39th Cong., 1st Sess. 41, 51 (July 25, 1866) 85

Developments in the Law–Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970) 91, 99, 110, 111

Dicey, The Law of the Constitution (10th Ed.) 96

Feinberg, The Expressive Function of Punishment in Doing and Deserving 41

Fried, An Anatomy of Values, (1970) 30

Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgements, 38 U. of Chi. L. Rev. 142 (1970) 107-108

Fustedler, Comedy in the Constitution, 37 N.Y.U. L. Rev. 841 (1972) 107

Hart, Forward; the Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959) 90, 91, 99

Haynsworth, A New Court to Improve the Administration of Justice, 59 A.B.A.J. 841 (1973) 107

Haynsworth, Improving the Handling of Criminal Cases in the Federal Appellate System, 59 Corn. L. Rev. 597 (1974) 107

Page

Kier, The Constitutional History of Modern Britain (8th Ed.) 96

Lay, Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved, 21 DePaul L. Rev. 701 (1972) 108

Lucas, The Principals of Politics, (1966) 31, 96

Mishkin, Forward, The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 86-87 (1965) 99, 110

Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157 (1953) 97, 105

Myers, The Habeas Corpus Act of 1867; The Supreme Court As Legal Historian, 33 U. of Chi. L. Rev. 31 (1965) 85, 86, 87

Niederhoffer, Behind the Shield: The Police and Urban Society 37, 47

Oaks, Habeas Corpus in the States–1776-1865, 32 U. of Chi. L. Rev. 243 (1965) 92, 93, 95

Oaks, Legal History in the High Court–Habeas Corpus, 64 Mich. L. Rev. 451 (1966) 92, 95

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. of Chi. L. Rev. 665 (1970) ..... *passim*

Pollack, Proposal to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L.J. 50 (1956) 79, 102

Posner, Economic Analysis of Law ..... *passim*

Potter, History and American Society (1974) 36

Prosser, Torts 4th 47

Reich, The New Property, 73 Yale L.J. 733 (1964) 32

Reiss, The Public and the Police 33, 38, 44, 47

Reitz, Federal Habeas Corpus; Post-Conviction Remedy for State Prisoners, 108 U. of Penn. L. Rev. 461 (1960) 99, 102

Page

Restatement of Torts, 2d., Sec. 12 (2) Sec. 388, Sec. 402A and Sec. 292A 43, 46, 47

Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev., 1, (1956) 88

Schrock and Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251 (1974) 35

Schwartz, Retroactivity, Reliability and Due Process, Reply to Professor Mishkin, 33 U. of Chi. L. Rev. 719 (1966) 103

Skolnick, Justice Without Trial (2d Ed.) 44, 109

Skolnick, The Politics of Protest: A Report to the National Commission on the Causes and Prevention of Violence (Ballantine, 1969) 36, 37, 38, 61, 62

Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. of Leg. Studies, 243 (1973) 33

Traynor, The Devils of Due Process in Criminal Detection, Detention and Trial, 33 U. of Chi. L. Rev. 657 (1967) 103

Weick, Apportionment of Judicial Resources in Criminal Cases: Should Habeas Corpus be Eliminated? 21 DePaul L. Rev. 740 (1972) 108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

v.

DAVID L. RICE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the District Court are at 388 F.Supp. 185 (D. Neb. 1974). The opinion of the Court of Appeals (App. I of Petition) is reported at 513 F.2d 1280 (8th Cir. 1975).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. May the suppression remedy be denied on the grounds that police were acting in good faith in making the search, even though they acted in contravention of Constitutional standards, in a case where they had no probable cause to believe that seizables were on premises, where no emergency situation existed requiring immediate action, and where the testimony of the police officers demonstrates that in making the search they acted on nothing more than a hunch?

2. Where the police searched residential premises pursuant to a search warrant issued on an affidavit which did not show probable cause, may the suppression remedy be withheld because of additional police information introduced at the suppression hearing which is merely cumulative of the contents of the affidavit already held to be defective?

3. May the suppression remedy be withheld on the grounds that a search was reasonable in a case where police entered and searched residential premises with a defective affidavit, without probable cause to believe that a seizable was on the premises, and where no emergency situation existed where life or property was threatened?

4. Where the Supreme Court of the State has held that a search was lawful because the warrant pursuant to which it was conducted was validly issued, should the United States District Court, having found the warrant invalid, have remitted the petitioner for habeas corpus to the state courts to litigate the validity of alternative justification of the search already presented to the State Supreme Court but not passed upon by it?

5. Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case is a question properly cognizable under 28 U.S.C. Section 2254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective

numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a state, or the members of the Legislative thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the

United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. §2254

2254. (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent

jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit–

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the

Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

STATEMENT OF THE CASE

David Rice is detained at the Nebraska Penal and Correctional Complex where the petitioner is the warden. He is there pursuant to a jury verdict of guilty and judgment and sentence to a term of life imprisonment pronounced upon him by the District Court of Douglas County, Nebraska on April 17, 1971. The jury found Rice guilty of the crime of first degree murder. The killing involved was the killing of Larry D. Minard, Sr., a member of the Omaha Police Department. Minard was killed on August 17, 1970, while making a police call. While on the premises where the call was being investigated, he was killed when a bomb exploded. The conviction of Rice was affirmed by the Supreme Court of the State of Nebraska on July 14, 1972 in an opinion reported at 188 Neb. 728, 199 N.W.2d 480 (1972).

After Rice's conviction was sustained in the state courts, he sought habeas corpus in the United States District Court for the District of Nebraska. Rice's attack on his conviction as constitutionally improper was bottomed on a claim that the products of two unconstitutional searches were admitted in evidence against him. (App. 5-6) The first search involved the search and seizure at his residence at 2816 Parker Street in Omaha, Nebraska on August 22, 1970. The second search involved the seizure and subsequent chemical examination of his clothing conducted on and after August 27, 1970, the date upon which he was arrested. Ultimately, the United States District Court accepted Rice's argument and granted the writ, directing his release unless he be tried within 90 days after the order became final and no longer subject to review. 388

F.Supp. 185 (1974). On the warden's appeal, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the District Court. 513 F.2d 1280 (1975).

The search and seizure issue arose in the following way. Minard, and other police officers who accompanied him, had gone to a home in Omaha as a result of a call on the police emergency number which reported a woman screaming at a residence at 2865 Ohio Street in Omaha. As the police entered the structure, they were forced to step over a suitcase lying on its side in the doorway. Sometime after the initial entry, Minard approached the suitcase and while he inspected it, it exploded, killing him.

The police immediately began an investigation of the crime. After a time, they obtained evidence that Duane Peak, a member of the National Committee to Combat Fascism, a political organization known in the community as the Black Panthers, had been involved in the crime. Specifically, they received information that it was Peak who had made the call regarding the disturbance. They also obtained evidence that Peak had sometime prior to the murder been seen with a suitcase similar to the one used.

The police also had information that Edward Poindexter, another officer of the NCCF, might have been involved in the killing. Specifically, they had been told by Donald Peak, a former member of the NCCF, that Edward Poindexter was the only member of the organization who Peak believed knew how to construct the bomb device. (Deposition of Samuel Cooper, State Court, pp. 19-20). Based upon the information gathered concerning Peak, a warrant was issued for his arrest the afternoon of August 22, 1970. At the same time, an

arrest warrant was issued for Edward Poindexter based upon the statement that he was the only member of the organization who might know how to make a bomb.

The police intelligence squad was familiar with the operations of the NCCF. For sometime prior to the death of Minard they had developed a file on this organization. The file included publications of the NCCF, some of which contained articles by Poindexter or by Rice, which the police interpreted as advocating violence against them.

The police constructed a list of different places where they thought Peak might be. The first of these places was the headquarters of the NCCF. A large number of officers converged there and searched those premises. An arrest was made at those premises. After the officers who made the search and arrest at the headquarters returned to the police station, they were subdivided into smaller parties and were instructed by Lt. Perry to "proceed with their previously assigned houses." (App. 71-72). As Lt. Swanson, another officer, describes the instructions that were given, they were ordered "To go to the known places of the NCCF and attempt apprehension of Duane Peak." (App. 35).

How many "known places of the NCCF" were searched in the effort to apprehend Duane Peak is not clear from the record. As Nebraska notes:

> "... The evidence only shows the police went to the NCCF headquarters, Poindexter's home, the home of Frank and Will Peak, before going to the Rice premises.... The only place entered prior to going to the Rice premises was the NCCF headquarters." Brief of petitioner, p. 38.

However, as the State also notes, "... There were many other units of the Omaha Police following leads and working on the case around the city in the hope of preventing further killings. The whole Omaha Police Department did not come to a standstill while the Rice premises were under surveillance..." Brief of petitioner, p. 41.

At about the time that the NCCF headquarters was searched, Poindexter was arrested. The arrest took place at 5:30 in the afternoon of the 22nd. (Poindexter's testimony, State Court, volume 2, p. 68). Pfeffer, one of the officers later involved in the search of Rice's home at 2816 Parker, had been involved in the arrest of Poindexter (State Court Transcript, volume 2, pp. 179-180).

The police had knowledge that Duane Peak, who they were seeking, was a member of the NCCF. Rice was also a member of that organization and one of its officers. His house had been a periodic meeting place for NCCF members. Peak was one of the members of the organization who had visited at Rice's house. The officers therefore went to Rice's house at 2816 Parker Street in search for Peak. At the time police arrived at Rice's house, Poindexter, the other party for whom they had an arrest warrant, had already been under arrest for several hours.

At p. 14 of its brief, the State attempts to rely on the testimony of Lt. Perry to show additional grounds for the search of Rice's house. That testimony was given in the United States District Court hearing. The District Judge specifically refused to give it credit. 388 F.Supp. 198-199.

The State also attempts to suggest that Rice's home was something other than a residence. However, the

only evidence that they point to is the fact that he displayed certain political objects on the house and that he regularly entertained his friends. Whether a house loses its character as a home when the American flag is displayed over it or when people of whom the Attorney General of Nebraska approves are entertained there, the State does not say.

At 10:30 the police arrived at Rice's home. They testified that they found the lights and the television on, but received no response to a knock at the door. The leaders of the police team, Lt. (then Sgt.) Swanson and Lt. (then Sgt.) Pfeffer decided not to enter the house. Rather they decided to obtain a search warrant for Rice's home. As Lt. Swanson explained:

> "Well one thing that had been troubling me all day, since the search of the Black Panther Headquarters, is that there was dynamite someplace but we hadn't been finding it, and so it occurred to me at this time, a decision was made right there. I said 'why don't we check this house for Duane Peak and we may find some dynamite or something in there; and maybe we ought to see if we have the grounds that we can put together a search warrant.' That was about our thinking on that." (App. 43).

The two command officers then returned to the police station, where they prepared an affidavit for a search warrant. The affidavit consisted of three allegations. (App.. 9-10). The first two, which rested upon the claimed knowledge of the officers, were that:

> "1. David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of police officers.
>
> "2. A violent killing of a police officer occurred in Omaha and arrests were made from the membership of the NCCF."

The third averment was based upon hearsay, it was that:

> "We have been told in the past that Rice keeps explosives at his residence, and also illegal weapons, which he has said should be used against police officers."

The tip, alleged in the affidavit, had been received by the police at least several weeks, and possibly several months, before the application for the search warrant (State Proceedings, vol. 2, p. 132). This fact, however, was not revealed to the magistrate. The tip was much less positive than the affidavit indicated. As Lt. Swanson testified in state court, "I was told at one time that if there was dynamite in town and if the NCCF had it, that David Rice's house would be one of the places that they might store it." (State Proceedings, vol. 2, p. 130)

In addition to the information contained in the affidavit, the police had certain other information, which they introduced in the state court suppression hearing. This information is summarized by the Supreme Court of Nebraska in its opinion at 188 Neb. 738-739, 199 N.W.2d 487-488. It consisted of the following:

> "It is worthy of mention that in connection with the search for explosives and devices at 2816 Parker Street under the warrant, there was conducted simultaneously therewith a search for Duane Peak for whom the police department of Omaha had at that time a warrant for arrest on a charge of first degree murder in connection with the death of Officer Minard. At that time the police department had the following additional

information as shown by the police reports introduced into evidence at the hearing on the motion to suppress: (1) On the morning of August 22, 1970, Donald W. Peak, brother of Duane Peak, was arrested and after having been given the Miranda warnings, voluntarily made a statement to the police. This directly, clearly, and almost conclusively identified Duane Peak as the person who physically delivered the bomb and placed the entrapping phone call; (b) Donald attributed Duane's acts to his membership in the NCCF (sometimes referred to in the record as Panthers); (c) indicated that the bomb had probably been made by Poindexter as head of the organization; and (d) that Duane had been told by headquarters 'to lay low.' (2) Item (1) (a) above was corroborated by five other identified persons from whom statements had been taken by the police department. (3) An identified informant, based on his own knowledge, stated that on the day following the bombing, David L. Rice had said, '. . . the action was a week late.' The informant interpreted the comment as referring to the bombing. (4) Rice and Poindexter were leaders and organizers of the NCCF. (5) A tape recording of the voice which had made the entrapping phone call was identified as that of Duane Peak. (6) Poindexter had been arrested about 6 p.m., on August 22, 1970, and declined to talk. (7) Personal knowledge of the police department that Rice had made statements in party newsletters led to the conclusion that he was an outspoken advocate of violence against police officers. (8) There were reports (plural) from individuals (plural) that Rice stored explosives at his home at 2816 Parker Street. (9) Literature had been found at the headquarters of the NCCF containing 'directions on how to make bombs'."

After obtaining the search warrant, at about 11:30, the two police officers returned to Rice's home and an entrance was made. In a box in the basement, the police testified that they found 14 sticks of dynamite, blasting caps, wiring, a battery, and a pair of long-nosed pliers.

On August 27, Rice voluntarily surrendered himself. Rice was placed under arrest for unlawful possession of an explosive substance. His arrest was based solely upon the items seized by the police at 2816 Parker Street on August 22, 1970. (Stipulation, State Court, vol. 2, p.64).

The clothing Rice was wearing at the time of his arrest was seized by the police and subject to chemical analysis for dynamite particles. The chemist who tested the garment found particles which he identified as ammonia dynamite (State proceedings, Vol. 5, Pages 776-781). However, his testimony was based on the presence of only some of the chemical elements, which constitute ammonia dynamite. He conceded that these chemical elements could be found in other common items in the environment, so that the particles might not have come from dynamite (State proceedings, Vol. 5, Page 838).

In the state courts, Rice sought suppression of the evidence seized at 2816 Parker and suppression of the results of the examination of his clothing as fruits of that search. His principal contention was that the affidavit upon which the warrant to search his home was based was fatally defective. The State introduced evidence to supplement the allegations of the affidavit. In addition, it sought to justify the search on the grounds of the existence of exigent circumstances and because of police possession of an arrest warrant for

Duane Peak. Both the Nebraska trial court and the Supreme Court found the affidavit sufficient. However, the Nebraska Supreme Court alternatively held that the allegations of the affidavit could be supplemented by additional evidence, and that the additional evidence demonstrated probable cause.

At Rice's trial, the principal evidence against him was the testimony of Duane Peak, who confessed that he had placed the bomb which killed Minard. Peak claimed that the bomb had been made at Rice's home, that Rice assisted in the making, and that the bomb had then been stored there. However, Peak's story of Rice's involvement in the case, which he testified to at trial, had not been consistently told. Initially he admitted his own guilt, but named no others. Thereafter, after conferring with his grandfather and an attorney, he gave a new statement in which he claimed that Rice was involved in the construction of the bomb. At Rice's preliminary hearing, he initially refused to answer certain questions. Again, after a visit with his grandfather and his attorney, he told the story he had given in his statement. (State proceedings, Vol. 4, Pages 482-483, 503, 523-525)

While Peak denied being threatened and claimed no deal had been made, after his testimony he was treated as a juvenile delinquent rather than an adult felon. Further, it is fair to say that the police and the prosecutors began with the assumption that Rice was involved with the bombing, and sought evidence to support this assumption, rather than being led to the conclusion that Rice was involved because of evidence which they found. Duane Peak filled the gap between the assumption of involvement and evidence of involvement, and in return, his offense was treated as trivial.

At Rice's trial, the evidence claimed to have been found in his home was used to buttress Peak's credibility. Thus, the dynamite was introduced in evidence. Similarly, the pliers found in Rice's home, a common type long-nosed pliers, was introduced in evidence. Upon the pliers were the remains of common copper wire (State proceedings, Vol. 5, Pages 830-831). In the house next door to the site of the bombing, a small piece of copper wire was found underneath a window (State proceedings, Vol. 5, Pages 739-740). The cut on this piece of wire showed certain similarities and certain dissimilarities to a sample cut on a piece of sheet metal made with Rice's pliers.

Rice testified in his own behalf. He denied involvement in the construction of the bomb. He denied that he had ever possessed either dynamite or blasting caps at his home.

In the federal habeas corpus proceeding, the district court in an opinion filed March 30, 1974, held that the affidavit was fatally defective and did not demonstrate probable cause. The court also held that the affidavit could not be supplemented with the additional information introduced in the state suppression proceeding in order to make out a case of probable cause.

The State had made little or no effort to support its exigent circumstances and arrest warrant justifications for the search. The District Court offered the State an opportunity to so supplement the record.

The State's evidence in the District Court was primarily devoted to the question of whether or not the police had probable cause to believe that Peak was at Rice's house when they went there. The police testimony demonstrated that there was no cause to believe that Peak was at Rice's house.

They had no reports of Peak being at Rice's house. He had not been seen in the vicinity of Rice's house. The only basis for seeking him there was that he was a member of an organization to which Rice belonged.

After the supplemental hearing the district court held that the State had not demonstrated that the police had probable cause to believe that Peak was in Rice's house when they made their entrance. The district court also held that no exigent circumstances existed which would have justified the police search without a warrant and that, in any event, the police had no probable cause to believe that any seizable was in the house at 2816 Parker Street when they made their entrance.

The Court of Appeals affirmed the district court on all issues. Certiorari was then sought by the warden on March 27, 1975. It was granted on June 30, 1975, bringing this case here.

SUMMARY OF THE ARGUMENT

I

Nebraska concedes that the District Court and the Court of Appeals made a proper application of existing Fourth Amendment learning in their decisions in this case. Nebraska seeks to have the exclusionary rule modified to save the search. The proposed modifications must be evaluated to determine their impact upon the functioning of the exclusionary rule. If the modifications substantially impair the tasks assigned to the exclusionary rule, their adoption would trench on rights guaranteed by the Fourth Amendment.

The Fourth Amendment protects the right to privacy by allowing an individual to create a sanctuary wherein he is free from governmental intrusion. *Katz v. United States*, 389 U.S. 347, 351-352 (1967). The expectation of privacy within such a sanctuary is not absolute. It is defeasible when the governmental interest in invading the secluded area overbears the interest in privacy and makes entrance reasonable. *Camara v. Municipal Court*, 387 U.S. 523, 534-537 (1967). However, in the absence of such an overriding interest, an invasion violates the Fourth Amendment.

Since the rights entrenched in the Fourth Amendment were written into the Constitution, they were intended to be meaningful. Rights are not meaningful if they can be invaded cost free.

The Fourth Amendment is part of the fundamental charter of our government. A government, which ignores its own laws loses its claim to legitimacy. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961). If no effective sanction against violation of Fourth Amendment rights is constructed, these rights will be invaded at will by agents of the government. Such invasions will substantially weaken the legal systems claim that it is based on law rather than naked force.

Searches which violate the Fourth Amendment are undertaken to procure evidence for criminal trials. The unlawful search achieves its goal when its fruits are admitted in evidence. In the absence of an effective sanction against the officer who transgresses the Constitution, admission encourages law officers to violate the Fourth Amendment in the future. The courts, which admit the evidence, then become "accomplices in the willful disobedience of the Constitution they are sworn to behold." *Elkins v. United States*, 364 U.S. 206, 223 (1960).

The exclusionary rule was adopted and made applicable to the states in order to serve as a remedy for Fourth Amendment violations. *Mapp v. Ohio*, supra. Existing alternative remedies to the exclusionary rule do not offer a meaningful alternative to it. *Bivens v. 6 Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 421-422 (1971) (dissenting opinion of Chief Justice). While other alternatives have been suggested, neither Congress nor the State Legislatures have seen fit to adopt them. Thus, at least at present, the maintenance of the exclusionary rule is a matter of constitutional necessity.

Since maintenance of the exclusionary rule is a matter of necessity, proposed modifications must be evaluated for their impact on its multiple functions. Modifications, which substantially interfere with its deterrent function or appear to sanction invasions of constitutional rights, must be rejected.

A. Nebraska argues that exclusion vel non should turn on the presence or absence of good faith upon the part of the police officer. The adoption of a situationally rooted good faith test would render highly unpredictable the application of the exclusionary rule. Such unpredictability would substantially lessen its deterrent effect, since if those threatened with sanctions can anticipate the procedure for determining whether or not to apply the sanction will miscarry, they are less likely to conform their standards to the norm. Posner, *Economic Analysis of Law*, p. 333. In any event, the testimony of the police in the courts below and the factual findings of those courts negate the application of a good faith standard to this case.

B. Nebraska argues that the police should be allowed to supplement a defective affidavit for a search warrant

at a hearing on a motion to suppress. The underlying premise of this argument is that the police demonstrate their good faith and allegiance to the Fourth Amendment whenever they seek a warrant. The Fourth Amendment requires that whenever practicable an invasion of a privileged area be preceded by a judicial determination of probable cause. *United States v. United States District Court*, 407 U.S. 297, 316 (1972). If this judicial role is to be meaningful, the justification of the search must be limited to the information presented to the magistrate. If that information can be supplemented, the procurement of the warrant becomes a ritual, and the magistrate is reduced from judge to ceremonial figure. Such invasion of the sanctity of the magistrate's role amounts to an elision of the warrant clause from the Fourth Amendment.

Nor may the mere fact that the police obtain a warrant be treated as demonstrating good faith. The police are responsible for the contents of the affidavit upon which the warrant is issued. They have at least the rudimentary familiarity with the requirements of probable cause. Experienced policemen know their judges, and the police select the magistrate to whom the affidavit goes. Thus, good faith cannot automatically be assumed because a warrant is issued.

In any event, the additional information presented in the state court suppression hearing did not demonstrate the presence of probable cause. The tip upon which the police acted was shown to be uncertain and stale. No evidence was offered to buttress the tipster's reliability.

C. Nebraska argues that the exclusionary rule should be modified so as to judge police conduct in invading premises to search by reasonableness under all the circumstances, and that a search may be treated as

reasonable even though the police lacked probable cause to believe that what they sought was on the premises. If an act is to be judged reasonable, then there must be some reason for the act. However, not just any reasons will do. A search is undertaken to find something. The reasons advanced for a search must be reasons which justify the belief that the things sought are in the place to be searched. If those reasons are to be deemed sufficient, they must be reasons which would persuade a reasonable man to believe that the things sought can be expected to be found in the place to be searched. But that is the definition of probable cause. *Carroll v. United States*, 267 U.S. 132, 162 (1925). Therefore, separate from its position in the second clause of the Fourth Amendment, the requirement of probable cause is implicit in the notion of a reasonable search. *Camara v. Municipal Court*, supra, 387 U.S. 535. Therefore, a search for persons or things may not be judged reasonable if the police lack probable cause.

In any event, the evidence here demonstrates that the police were not acting in an emergency. Nor is any information pointed to which would support a reasonable belief that seizable persons or things were on the premises searched. Therefore, there is no evidentiary support of an evaluation of the search at 2816 Parker as reasonable.

II

Having held that the search at 2816 Parker could not be justified by the warrant, the district court was then faced with the issue of whether or not it could pass upon the alternative justifications offered by Nebraska for the search. In the Supreme Court of Nebraska, Rice

had attacked the validity of the search warrant used to justify the search. The state defended the warrant but argued alternatively that the search could be justified either by exigent circumstances or by possession of the arrest warrant for Duane Peak. Since the Supreme Court of Nebraska upheld the validity of the warrant, it did not pass upon these alternative justifications for the search. Nevertheless, the district court held that the exhaustion requirement of 28 U.S.C., Sec. 2254 had been satisfied on these issues. Its holding was affirmed by the Court of Appeals. These rulings on exhaustion are clearly correct. All that is required is presentation to the highest court of the state. *Picard v. Conner*, 404 U.S. 270, 275 (1971). Since there had been presentation, the requirement of the exhaustion test was met. *Humphrey v. Cady*, 405 U.S. 504, 516 fn. 18.

III

Nebraska seeks to have search and seizure cases excluded from the district courts jurisdiction under 28 U.S.C. Sec. 2254, unless the state has failed to grant a habeas applicant an adequate opportunity to ventilate the search and seizure issues in its state's courts.

In *Brown v. Allen*, 344 U.S. 443 (1953) and again in *Fay v. Noia*, 372 U.S. 391 (1963) this court held that the habeas corpus jurisdiction of the district court reached any case in which the claim was made that a state conviction was infected with constitutional error, that is, any case in which controlling federal constitutional law had been misapplied. When *Mapp v. Ohio*, supra, made the exclusionary rule applicable to the states, that holding brought state search and seizure

cases within the ambit of section 2254. The jurisdiction over search and seizure cases was confirmed in *Linkletter v. Walker,* 381 U.S. 618 (1955) and reiterated in *Kaufman v. United States,* 394 U.S. 217 (1969).

A. *Brown v. Allen* has been law since 1953. Congress has had ample opportunity to overrule it. It has not done so. *Fay v. Noia* was decided in 1963. Congress has had ample opportunity to overrule it. It has not seen fit to do so. *Linkletter v. Walker* was decided in 1965. Congress has had ample opportunity to overrule it, it has not seen fit to do so. In 1966, after all these cases had been decided, Congress reenacted the jurisdictional grant of 2254. *Kaufman v. United States* was decided in 1969. Any doubts that search and seizure cases came within the scope of habeas were laid to rest there. Congress has had the opportunity to overrule that case. It has not seen fit to do so.

The jurisdiction of the inferior federal court and the enforcement of the Fourteenth Amendment are matters for the Congress. Congress exercised its authority when it enacted 2254 in its original form in 1867. Modification of the authority granted by that act is a matter for the Congress.

1. The holding in *Brown v. Allen* reaffirmed in *Fay v. Noia* that federal habeas corpus reached all constitutional error in state proceedings is consistent with the original intent of Congress in granting jurisdiction over all restraints of liberty "in violation of the Constitution." The Habeas Corpus Act of 1867 was the product of a period of intensely nationalistic feeling. It was the product of a skepticism of the ability of state courts to adequately vindicate federally guaranteed rights. The new Habeas Corpus Act was

"designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantee." *Fay v. Noia,* supra, 372 U.S. 415-416.

> "... Federal trial jurisdiction in its timely, efficacious exercise to protect the freedom secured against state action by the postwar amendment ... was the critical concern of the reconstruction congresses. In matters of civil rights, it was their considered resolution of the federal problem. One may agree or disagree with their conception of the appropriate relationship of the nation and the states. Nonetheless, under the Constitution Congress is given primary responsibility for designing the shape of American federalism and for defining the role of federal courts in effectuating its goals. This responsibility forbids winking away the plainly nationalizing purpose of the reconstruction legislation, even on the firm conviction–which the Supreme Court has sometimes not quite managed to conceal–that bad Cad Stevens and his rads were a bit of transient aberration not to be taken seriously." Amsterdam, *Criminal Prosecutions Effecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trials,* 113 U.Pen. L. Rev. 793, 829-830 (1965).

Brown v. Allen and *Fay v. Noia* were the culmination of a steady lengthening of the reach of federal habeas corpus "by reason of the Supreme Court's ever widening translation of the specific guarantees of the National Bill of Rights into the more generalized limitations upon state action stated in the Fourteenth Amendment." McGowan, *The Organization of Judicial Power in the United States,* p. 52. The decisions were solidly rooted in the prior construction by this Court of

the federal habeas jurisdiction. The jurisdiction grew by accretion not by avulsion.

2. The reach given to habeas corpus jurisdiction in *Brown v. Allen* and *Fay v. Noia* is consistent with the historic understanding of the writ at the time of the adoption of the Constitution. At the common law "the writ lay to test any restraint contrary to fundamental law . . ." *Fay v. Noia,* 372 U.S. 426. *Brown v. Allen* and *Fay v. Noia* translate that function from the English setting, where the fundamental right was to be tried according to the ordinary course of common law, into an American setting where specific procedural rights are guaranteed by the written Bill of Rights.

3. The federal habeas jurisdiction exists to assure state prisoners an opportunity to have federal constitutional claims passed upon by federal constitutional courts. Since this Court cannot perform that function in most cases, the task of review is assigned to the district court exercising the habeas jurisdiction. The need for independent review is no less present in cases involving the exclusionary rule, where guilt or innocence is not central to the right violated, than in cases where the right goes to guilt or innocence. Indeed, a right not directly related to guilt or innocence is less likely to excite state court deference to federal interest than one whose relevance to guilt can be directly perceived.

While these arguments for the habeas jurisdiction may be unsound, they have been embodied in this Court's case law for many years. If this long standing construction of the habeas jurisdiction is to be reversed, the proper forum for change is the Congress.

B. One of the principal justifications for the federal habeas jurisdiction is that on the practical level the

state judge's allegiance to the Constitution may be weakened by his proximity to the state's enforcement of its criminal law. This proximity would have its greatest impact on a judge in a case where the constitutional provision involved was irrelevant to guilt or innocence. Search and seizure cases are a paradigm of constitutional litigation in which guilt or innocence is not involved. They are, therefore, the cases in which it is most likely that federal rules will be ignored in service in the interest of law enforcement.

If the federal habeas corpus jurisdiction over search and seizure cases was removed, the police would foresee a resolution of search and seizure issues primarily by state trial judges likely to be more sympathetic to the policemen than to the Fourth Amendment. Since the efficacy of a sanction turns in large measure on the perception of the risk of detention and adjudication of fault, this anticipation of a friendly forum would substantially ennervate the deterrent effect of the exclusionary rule in cases where it now has an impact. On the other hand, the threat of having conduct reviewed before a federal judge, whose primary allegiance is to the Supreme Court's interpretation of the Constitution, serves as a substantial deterrent, even where the police can foresee being heard in the first instance by a sympathetic state judiciary. Thus, removal of search and seizure cases from the habeas jurisdiction would substantially interfere with the operation of the exclusionary rule.

C. Rice went to the district court and its jurisdiction under section 2254, rather than to this Court, because existing case law indicated that a petition for certiorari was not a prerequisite to habeas. The opinions of the district court and of the court of appeals demonstrate

that the decision of the Nebraska Supreme Court was seriously inconsistent with this Court's interpretation of the Fourth Amendment. Thus, Rice's case was one where certiorari might have been successfully sought. The opportunity to seek direct review is now gone. If the jurisdiction of the district court is now to be modified to exclude search and seizure cases, such modification should not be applied in a case like this. To retroactively apply a modification to this case would be extremely unfair.

ARGUMENT

I.

THE MODIFICATIONS OF THE EXCLUSIONARY RULE, WHICH NEBRASKA PROPOSES, WOULD SUBSTANTIALLY THWART THE OPERATION OF THAT RULE AND LEAVE FOURTH AMENDMENT RIGHTS WITHOUT REMEDIAL PROTECTION. IF THE FOURTH AMENDMENT IS TO BE MORE THAN A FORM OF WORDS, THESE MODIFICATIONS SHOULD BE REJECTED. IN ANY EVENT, THE PROPOSED MODIFICATIONS HAVE NO RELEVANCE TO THE FACTS OF THIS CASE, AND HENCE WOULD NOT SAVE THE SEARCH.

The decisions of the courts below involve a straight forward application of existing learning under the exclusionary rule. The correctness of those decisions under present law is not contested. Rather Nebraska argues that this case presents the Court with an

appropriate vehicle for modification of the exclusionary rule. While Nebraska seeks only modification of the rule, certain of the Amici, New Jersey and Utah, seek the total abolition of the rule in state cases.

In support of its argument for modification of the exclusionary rule, Nebraska offers a cost benefit analysis designed to show that the rule is not worth maintaining. The analysis is fundamentally flawed. The exclusionary rule exists to vindicate Fourth Amendment rights. It cannot be evaluated independently of the rights which the Fourth Amendment guarantees. To ignore the function of the rule in vindicating Fourth Amendment rights is to ignore the Fourth Amendment. The exclusionary rule is the only effective existing remedy for vindication of Fourth Amendment rights. Substantial modification of the exclusionary rule leaves Fourth Amendment rights unprotected. In the absence of an effective alternative remedy already in place, continuation of the exclusionary rule is a matter of constitutional necessity.

Nebraska's arguments with regard to the costs of the exclusionary rule fail to recognize how much of that cost is produced by the Fourth Amendment, rather than by the exclusionary rule. It is the Fourth Amendment that imposes the limitations on police practices, not the exclusionary rule. Implicit in Nebraska's argument is the assumption that Fourth Amendment rights may be weighed against the demands of law enforcement and that a balance can be struck wherever current notions of good social policy require. This type of approach ignores the function of a constitutional bill of rights. A constitutional bill of rights renders the liberties it protects immune from re-evaluation, except through the process of constitutional amendment.

Finally, Nebraska's evaluation ignores other important benefits which the exclusionary rule confers. Since there are no effective alternatives to the exclusionary rule in place, abolition of the rule would free police conduct from exterior review. The police would become a law unto themselves. So long as the exclusionary rule exists, it assures that the police are subject to judicial review of their conduct in making arrests and searches, and hence, renders them subject to the rule of law. Police obedience to law is an essential pre-requisite to the maintenance of legality.

We turn then to an appropriate cost benefit analysis of the exclusionary rule. We believe that this analysis will demonstrate that maintenance of the exclusionary rule is constitutionally required. Once the current necessity of the exclusionary rule is established, Nebraska's proposed modifications to the rule must be evaluated to determine their impact on the operation of the exclusionary rule. If a modification substantially interferes with the functions assigned to the rule, then it must be rejected.

The Fourth Amendment protects the right to privacy. "Privacy is . . . the control we have over information about ourselves." Fried, *An Anatomy of Values,* p. 140 (1970). This control over information is a necessity of human life.

> "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality, he merges with the mass. His opinion, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted one; his feelings being openly exhibited tend to lose their quality of

> unique personal warmth and to become the feelings of every man. Such a being, although sentient is fungible; he is not an individual." Bloustein, *Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser,* 39 N.Y.U.L. Rev. 962, 1002 (1974).

The Fourth Amendment grants the individual control over information about himself by allowing him to create sanctuaries within which he is free from intrusion. *Katz v. United States,* 389 U.S. 347, 351-352 (1967); *See v. Seattle,* 387 U.S. 541, 543-546 (1967); *Mancusi v. DeForte,* 392 U.S. 364, 368 (1968). The exemplar of such a sanctuary is the private home. Within the home "a man is both free himself to act and secure from other men's unwelcome attentions. Because men have separate homes, we can in general provide a modicum of freedom and security. Often what I am not allowed to do in public–e.g. walking about naked–I am allowed to do in the privacy of my own home: and, far more often if I want immunity from other men's action, I can obtain it by withdrawing into the security of my own home. Homes are, almost literally, spheres of influence. Although, . . . all problems of human conduct cannot be solved by simply dividing up the world into spheres of influence–in part, because men want to interact with one another, and not to be altogether isolated–yet the idea is a natural one, and by assigning men their private spheres, we do ease, even if we do not abolish, conflicts between one man's freedom and another man's security, by providing one or the other with an acceptable alternative." Lucas, *The Principals of Politics,* (1966), pp. 181-182. Because of this special role of the home in the protection of privacy, the protection of the home from unwarranted

invasion lies at the core of Fourth Amendment protection. *Wyman v. James*, 400 U.S. 309, 316-317 (1971).[1]

The authors of the Fourth Amendment entrenched the rights which it protects in the Bill of Rights. Since these rights were written into the Constitution, they were intended to be meaningful. If Fourth Amendment rights are to be meaningful, then some sanction or remediation must be available against the party who invades them. If Fourth Amendment rights can be invaded cost free, they will be. The exclusionary rule was adopted and applied to the States as surety that the Fourth Amendment would not be "reduced to 'a form of words' ", *Mapp v. Ohio*, 367 U.S. 643, 648 (1961).

The Fourth Amendment is part of the Constitution. Judges are sworn to uphold the Constitution. Searches, which violate the Fourth Amendment, are undertaken to procure evidence for criminal trials. The unlawful search achieves its goal when its fruits are admitted in evidence. In the absence of an effective sanction or remedy against the officer who transgressed the

[1]Fourth Amendment protections, "often have nothing to do with privacy at all," *Katz v. United States*, Supra 389 U.S. 350, and protect only property rights. However, at the time the Bill of Rights was adopted radical distinctions were not drawn between personal rights and property rights. The kinds of property with which the authors of the Bill of Rights were familiar, and the kinds they enumerated in the Fourth Amendment, "houses, papers, and effects," are those most intimately connected with personality. See, Reich, *The New Property*, 73 Yale L.J. 733, 771-772 (1964). The Amendment protects property, only when the owner thinks enough of it to seclude it from public inspection. *Hester v. United States*, 265 U.S. 57 (1924).

Constitution, admission encourages the officer to do likewise in the future and by example encourages other officers to emulate him. The courts then become "accomplices in the wilful disobedience of a Constitution they are sworn to uphold." *Elkins v. United States*, 364 U.S. 206, 223 (1960). The exclusionary rule was adopted and made applicable to the States to prevent the courts from playing this base role. *Mapp v. Ohio*, supra, 367 U.S. 659.

Amsterdam well sums up the constitutional status of the exclusionary rule as it emerges from this Court's decisions.

> I am not suggesting that the exclusionary rule is an explicit command of the Constitution nor do I mean to make more of the Fourth Amendments language than the skein of a living thought that dwells within. The rule was fashioned by judges as an expression of that thought. What the Constitution does command is that the administration of the system of criminal justice be so ordered as not to produce incentives toward unreasonable searches and seizures which it is not fully capable of restraining. Unless and until a far better system of restraints is devised and put into effective operation than we now have or can soon anticipate, the exclusionary sanction is the only way to honor that command." Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 433 (1974).

The alternative remedies to the exclusionary rule currently in place do not offer a meaningful alternative to the exclusionary rule. Oaks, *Studying the Exclusionary Rule In Search and Seizure*, 37 U. of Chi. L. Rev. 665, 673-674; Amsterdam, op. cit., 58 Minn. L. Rev. 429-431; Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its*

Alternatives, 2 J. of Leg. Studies, 243, 269-273 (1973). Reiss, *The Public and the Police,* pp. 190-191. Abandonment of the exclusionary rule would amount to abandonment of the Fourth Amendment. Amsterdam, op. cit. 58 Minn. L. Rev. 431.

The principle cost of the exclusionary rule is the suppression of relevant evidence. Sometimes, the suppression of evidence allows the guilty to go free. However, much of this cost is an inevitable result of the limitations imposed upon police practices by the Fourth Amendment. If the exclusionary rule is to be replaced, it can only be replaced by a rule which is a greater deterrent to police misconduct than the exclusionary rule. However, if a more forceful deterrent is adopted, it presumably would decrease the number of unlawful searches and seizures. If unlawful searches and seizures must be conducted to detect crime, a more effective deterrent would not free the guilty, but it would prevent their being apprehended, since fewer unlawful searches would be undertaken. The bar to unlawful searches and seizures is not the exclusionary rule; it is the Fourth Amendment. Oaks, op. cit., *Exclusionary Rule in Search and Seizure,* 37 U. of Chi. L. Rev. 754.[2]

---

[2]Our argument proceeds on the assumption that exclusion is derivative from the Fourth Amendment and not part of the Fourth Amendment right. That assumption represents current law. *United States v. Calandra,* 414 U.S. 338, 354 (1974). On past occasions, however, this Court has viewed exclusion as "an essential part of the right to privacy". *Mapp. v. Ohio,* supra, 367 U.S. 656. On the view that exclusion is derivative, a defendant is not deprived of constitutional right by the admission of evidence illegally seized from him. However, if exclusion is part of the right to privacy, admission is a new wrong.

A person places in his private sanctuary that which he wishes to keep secret. Intrusion invades the sanctuary and violates his

Derivative from its role in the protection of the Fourth Amendment is the exclusionary rule's function of preserving the institution of legality. The American

---

right to privacy. However, his secrets are known only to the intruders. Subsequent dissemination by the intruders of the information found constitutes an additional invasion of privacy. Information about the person, which he was entitled to keep secret, is made public.

There is another version of the argument that a wrong is done by admission of unlawfully seized evidence. That argument has much to commend it. A person who has done an unlawful act is liable to punishment. However, unless we view the performance of the unlawful act as removing the offender from society, punishment is only properly inflicted in accordance with the rules that surround the institution of punishment. If the rules of the institution are violated, the punishment is not lawful. One of the conditions that surrounds the institution of punishment in the United States is the limitation of the mode of evidence gathering in the Fourth Amendment. If that limitation is violated and the fruits used, a defendant may complain that a wrong has been done him. Even though he is deserving of punishment, he is deserving only of lawful punishment. The state has set up the institution of punishment. It has defined the conditions upon which punishment may be inflicted. It then proceeds to punish in violation of those conditions.

In some respects, a defendant's situation is analagous to that of the man who has committed a crime and then suffers extra legal punishment. A guilty man lynched suffers a wrong, even though his execution by the State after a fair trial would be proper.

In practice, it might be difficult to separate mere errors in procedure in an otherwise lawful infliction of punishment from fundamental violations of process that makes punishment unlawful. However, the Constitution circumvents this problem by imbedding certain processes in a fundamental set of rules, which must be then treated as central to the institution of lawful punishment. See, Schrock and Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement,* 59 Minn. L. Rev. 251 (1974).

legal system depends on citizen cooperation for its operation. Law derives its binding force and secures that cooperation, "more from its claim to embody society's concept of justice than from its threat of penalties." Potter, *History and American Society*, (1974) p. 405. Much of that claim would be lost if government came to be perceived as law breaker. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, supra 367 U.S. 659.

> "The importance of police to our legal process can hardly be over-estimated. The police are the interpreters of the legal order to the population; indeed for many people, they are the sole source of contact with the legal system . . . So what the policeman does is often perceived as what the law is, and this is not an inaccurate perception." Skolnick, *The Politics of Protest: A Report to the National Commission on the Causes and Prevention of Violence.* (Ballantine, 1969), p. 269.

Since many perceive the legal system solely in terms of police conduct, a perception of the police as law breakers leads to perception of the legal system as lawless. ". . . Loss of faith in the authority of the law may move rational persons toward extra legal action." Skolnick, *The Politics of Protest*, p. 325.

To assure that those who have governmental power exercise it in accordance with law, the possessors of power must be made responsible for their uses of that power. Responsibility is assured, when the possessors of power are required to give a legal justification for their actions. American public law secures responsibility in large measure through the device of judicial review. Those who exercise discretion must exercise it in accord

with law, and reviewability is presumed in order to assure that they do so. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In the judicial forum, a citizen may challenge exercise of authority against him, and those who have exercised the authority are required to demonstrate their legal justification. Police officers, "engaged in the often competitive enterprise of ferretting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), are unlikely candidates to be granted unreviewable discretion. "[T]he policeman frequently loses the ability to distinguish between law and license in himself." Niederhoffer, *Behind the Shield: The Police and Urban Society*, pp. 64-65.

> "[A]t first impression it would appear that above all other groups the police ought to be tied to the law, but because they learn to manipulate it, the law can become nothing but a means to an end. In performing his special role in the social system, the policeman realizes that for much of his time on duty he is above the law. Paradoxically, society has granted him the license to disregard the law in order to enforce it. He may kill where necessary, he may destroy property and invade privacy; he may make arrests merely on the grounds of suspicion; he may disregard traffic regulations. The sense of power often corrupts him into a belief that he is superior to the law." Niederhoffer, op. cit., p. 97; Skolnick, *The Politics of Protest*, p. 270.

However, abolition of the exclusionary rule would leave police conduct with regard to arrests and searches and seizures outside the control of the judicial process.

The police are dependent upon community cooperation for effective functioning. This cooperation is only forthcoming when the police are perceived as instru-

ments of law rather than aggressors. Reiss, *The Public and The Police*, pp. 69-70, 175.

> ". . . Police are not supposed to adjudicate and punish; they are supposed to apprehend and take into custody. To the extent to which a nation's police step outside such bounds, that nation has given up the rule of law in a self-defeating quest for order." Skolnick, *The Politics of Protest*, p. 249.

When the police step beyond the bounds of law, they lose their claim to legitimacy. Legitimacy being absent, force and violence become the only techniques of law enforcement.

The exclusionary rule, to the extent it secures police compliance with the Constitution, vindicates the laws "claim to embody society's concept of justice." The stronger that claim, the more likely voluntary obedience to the law's commands. The exclusionary rule, to the extent it secures police compliance with the Constitution, preserves the police officers claim to legitimacy.

> "Lest any one conclude that the dependence of a civil police on a civil society is a license for the police to misbehave, it should be clear that it is the responsibility of government in a democratic society to insure that its servants behave in a civil fashion. The police are not only obligated to behave in a civil way towards citizens but their behavior is strategic in changing relations between citizens and the police. To the degree that we can develop civility in police relations with citizens, we move toward a civil society." Reiss, *The Police and The Public*, p. 221.

The exclusionary rule achieves these goods only imperfectly. That, however, is an unsurprising comment on a human institution.

Whatever the merits or demerits of the exclusionary rule, it is the sole protector of Fourth Amendment rights. Its abolition prior to the creation of a new guardian creates intolerable dangers. As the Chief Justice observed in his dissenting opinion in *Bivens v. 6 Unknown Federal Narcotics Agents*, 403 U.S. 388, 420-421 (1971):

> ". . . In a sense our legal system has become the captive of its own creation. To overrule *Weeks* and *Mapp*, even assuming that Court was now prepared to take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed–that an open season on 'criminals' had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be."

The second danger is related to the first. The exclusionary rule is unpopular with the public. Yet, that unpopularity paradoxically is an expression of public faith in the values the Fourth Amendment protects. In a large measure, the public call for "law and order" reflects a fear that people are no longer safe in their own homes. While abolition of the exclusionary rule might aid in quieting these fears, abolition without appropriate alternative could replace the fear of intrusion by a wrongdoer by fear of unwarranted intrusion by the police. When the home is no longer

perceived as a sanctuary, it is no longer a home.

Since no alternative to the exclusionary rule is now in place, we cannot do without the rule. Since the exclusionary rule is not to be abolished, proposed modifications of the rule must be examined against the backdrop of a continuing need for the exclusionary sanction. If a proposed modification substantially interferes with the rule performing its functions as sanction for the Fourth Amendment, that modification should be rejected.

The description of the exclusionary rule as a sanction of a sanction is to deter future wrongful conduct by setting the price of wrongdoing higher than its benefits. Posner, *Economic Analysis of Law*, p. 7. This function has been emphasized by the Court. See, e.g. *Brown v. Illinois*, 43 Law Week 4937, 4940 (1975). Since searches in criminal cases are undertaken to procure evidence, the advantage of unlawful search is nullified when admissibility is denied. This Court has also emphasized the role of the exclusionary rule in the preservation of judicial integrity. See, e.g. *Brown v. Illinois*, supra. Most obviously, judicial integrity is served when the courts refuse to become parties to an unlawful search by admitting its fruits. But more than this is involved in the concept of judicial integrity. That function is intimately related to what we have referred to as the preservation of legality. A legal rule honored only in the breach loses its character as law. When a court rejects unlawfully seized evidence, it preserves the Fourth Amendment. It reannounces that the Fourth Amendment is part of the Constitution, and that the values contained in the Fourth Amendment are worth preserving. It speaks on behalf of the legal system to authoritatively disavow the unlawful act. While the

policeman purported to act in the name of the law, he went beyond his authority, and that excess of power is condemned. See, Feinberg, "The Expressive Function of Punishment," in *Doing and Deserving*, pp. 101-104.

We turn then to an appraisal of the impact of Nebraska's proposed modifications upon the functioning of the exclusionary rule. We lay heavy emphasis upon the factor of deterrence, since that has bulked so large in this court's recent discussions of exclusion. However, any modification of the rule which lessens its deterrent impact or makes unlawfully seized evidence generally admissible entrenches upon the integrity of the judiciary and the legitimacy of the legal system by refusing to condemn actions in violation of the Constitution.

A. To Make the Operation of the Exclusionary Rule Depend Upon the Absence of Good Faith on the Part of Police Officers Would Substantially Diminish the Deterrent Effect of the Exclusionary Rule. In any Event, the Evidence Here Does not Demonstrate That the Police Acted in Good Faith.

Nebraska argues that (1) evidence should not be suppressed even though a search was unlawful if the police were proceeding in good faith at the time that the search was made. Brief of petitioner, pages 23-26; 35-38. We will demonstrate that any change from the current standard of strict liability that now obtains in search and seizure cases would substantially diminish the deterrent effect of the exclusionary rule. Since this Court is committed to the premise that modifications or extensions of the exclusionary rule should be

measured by their impact upon future police conduct, such a demonstration renders a good faith standard untenable. *Brown v. Illinois*, 43 Law Week 4937, 4941 (1975); *United States v. Peltier*, 43 Law Week 4918, 4921 (1975); *Michigan v. Tucker*, 417 U.S. 433, 447 (1974); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

In analyzing the impact upon deterrence of the adoption of a good faith standard, it is important to set to one side cases such as *Michigan v. Tucker, supra*, and *United States v. Peltier, supra*, which have dealt with the question of whether changes in constitutional standards should be retroactively applied to conduct lawful when engaged in, but rendered unlawful by subsequent decisions. When liability is absolute, that is, when sanctions are imposed without regard to conduct, for example random punishment, deterrence is rendered nil. Since compliance or non-compliance is irrelevant to punishment, there is no advantage in complying. Posner, *Economic Analysis of Law*, p. 369. Retroactivity cases have been designed to avoid this problem of absolute liability. Retroactive application of change standards would tend to induce in the police the belief that their conduct is irrelevant to suppression or non-suppression. If the police view the judicial process as random, the suppression remedy would be no deterrent. However, allowing officers to maintain the fruits of their searches, if they were lawful when made, awards compliance with existing standards. Therefore, the denial of the suppression remedy in retroactivity cases functions as an encouragement to compliance, and hence as a deterrent to violation.

This analysis cannot be carried over to a case where the officer violates existing standards. In such a case, the standard existed prior to its conduct, and was

therefore a standard of which the officer could have known. If despite the knowability of the standard the officer's subjective good faith is used as a measuring stick, constitutional rights become variable with the abilities of the particular officer in the case. Then, the officer who made the least effort to master constitutional standards would run the least risk of suppression. Even with the application of a negligence standard, where the knowledge required of the officer would be measured by the objective standard of what a reasonable police officer should know, Restatement Torts, 2nd, Sec. 12 (2), deterrence would be diminished. Since the standard would depend on the facts of each particular case, the officer would have a strong inducement to act, without regard to his actual knowledge of standards, in the hope that he could persuade a court later that his action was reasonable.

The breach of constitutional rights to be deterred is never the one involved in the suppression proceeding. That violation has already taken place. *Elkins v. United States*, 364 U.S. 206, 217 (1960), Posner, *Economic Analysis of Law*, p. 7. From the point of view of deterrence, the importance of imposition of sanctions in a particular case is the effect of those sanctions on future conduct. When a sanction is imposed, those who impose the sanction demonstrate that they care enough about the norm violated to act upon its behalf and to attempt to maintain it. Hence, the norm is both demonstrated and reinforced. Those who might violate a norm are warned in advance of what the norm is and are told that it is important enough that a violation will be accompanied by sanctions. The threat of sanctions makes the violation of the norm potentially more costly than it otherwise would be, and "by thus altering the

prices that confront people, the warning may affect their behavior . . ." Posner, *Economic Analysis of Law*, p. 7.

If police agencies are interested in convictions, then exclusion should be an effective sanction against unlawful police conduct. Posner, *Economic Analysis of Law*, p. 384; Skolnick, *Justice Without Trial*, (2d ed.), p. 224. However, the deterrent effect of the suppression remedy is diluted to the extent that the police, when they decide whether or not to violate the standards of the Fourth Amendment, can anticipate the procedures for determining whether or not to apply the remedy will miscarry. Posner, *Economic Analysis of Law*, p. 333.

Clearly, if deterrence is the purpose of the exclusionary rule, a subjective good faith standard is disqualified. As we have already noted, it leaves the protection of constitutional rights variable with the abilities of the individual police officer. It "would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various . . ." *Vaughn v. Menlove*, 3 Bing. (N.C.) 468, 475, 132 Eng. Rep. 490, 493 (1837). In addition, since all the officer need do to save the fruits of his search is to convince the judge that he did not know that he was doing wrong, a subjective standard creates a strong motive for the officer to search whenever he thinks there is a gain from searching, and later manufacture a story which justifies the search. See, Reiss, *The Public and The Police*, pp. 133-134; Skolnick, *Justice Without Trial* (2d ed.), p. 215; Oaks, *"Studying the Exclusionary Rule in Search and Seizure."* 37 U. Chi. L.R. 665, 696-699, 739-742 (1970). As Skolnick notes:

> ". . . the policeman respects the necessity for 'complying' with the arrest laws. His 'compliance' however, may take the form of manipulation of the facts rather than before the fact behavior . . . but when he sees the case law as a hindrance to his primary task of apprehending criminals, he usually attempts to construct the appearance of compliance, rather than allow the offender to escape."

If this type of situation has existed, and has hindered the work of the exclusionary rule applied objectively, its impact under a subjective standard would totally devastate the effectiveness of the exclusionary rule.

However, neither *Michigan v. Tucker*, nor *United States v. Peltier*, adopted a subjective good faith standard. Rather, each of those cases adumbrated the utilization of a negligence standard. Thus in *Peltier* the court stated:

> "The teaching of these retroactivity cases is that if the law enforcement officer *reasonably* believed in good faith that evidence they had seized was admissable at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decision subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner . . ." 43 L. Wk 4920.

and at a later point the court stated:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officers had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the 4th Amendment . . ." 43 L. Wk 4922.

While the negligence standard suggested by these cases is not so ineffectual as a subjective good faith standard, it suffers from the same vice. That is the variability of result produced by the standard serves as an inducement to unlawful conduct.

In strict liability cases, such as the current application of the exclusionary rule, the focus is on the actual conduct engaged in. Was the result of that conduct in compliance with the norm or not? In negligence, with an objective standard, the focus is not solely on the end result of conduct. Even if the end or result is unsatisfactory, if the party who acted cannot reasonably be expected to have acquired knowledge that his conduct might miscarry, then the failure to achieve the end will not condemn the conduct. Compare, Restatement Torts 2d, Sec. 388 and Sec. 402 A.

Strict liability has a greater deterrence potential than negligence. Strict liability reduces uncertainty about the results of the sanction applying process, and hence increases the certainty that sanctions will be applied on violations of norms. Posner, *Economic Analysis of Law*, p. 342. Strict liability encourages those engaged in conduct subject to its standards to avoid areas of potential liability. See, *Gertz v. Welch*, 418 U.S. 323, 339-341 (1974).

In negligence cases, since the result is less predictable than in a strict liability case, the dilution of deterrence that results from variability of standard in subjective good faith cases also obtains. In addition, the application of a negligence standard in cases involving police conduct would be fraught with special difficulties. In most cases where a negligence standard is applied to those with special skills, such as the police,

expert evidence is required to prove the standard. Restatement Torts 2d, Sec. 292A; Prosser, Torts 4th, p. 161. How a defendant in a criminal case could elicit such expert evidence to define the standard is difficult to conceive. The mores of the police are against testimony.

> "The subcultural norm against testifying or informing against a fellow officer is one of the strongest in the subculture, holding as strongly for internal as for external investigations. The subculture price for violating the norm is absolute exclusion from the informal life of officers and refusal by all officers to work with the officer who would 'cop out'. The latter was the devastating effect of getting superiors to carry out this ultimate punishment of banishment by ordering removal of the officer for 'failure to get along with his fellow officers.' Indeed, it is as unlikely for one police officer to testify against another as it is for one student to testify that another has cheated in a classroom situation . . ." Reiss, *The Public and The Police*, p. 213; Cf Niederhoffer, *Behind The Shield*, p. 69;

Thus, a conspiracy of silence situation analogous to that which long obtained in medical malpractice cases would be created. See, Amsterdam, "Perspectives on the 4th Amendment," 58 Minn. L.R. 349, 430 (1974).

Alternatively, the courts could be left free to craft a standard of knowledge which they believe the police should meet, without regard to the actual level of knowledge obtained by policemen. However, this approach would either lead to a case by case evaluation or to a return to substantially the place where we are not in the application of the exclusionary rule.

One approach to the application of the reasonableness standard would be to attempt to determine in the

particular case what level of knowledge should be required of police officers and to return suppression upon that level of knowledge. "This approach would lead to unpredictable results and uncertain expectations, and could render our duty to supervise the lower courts' unmanageable" *Gertz v. Welch, supra,* 418 U.S. 343. As Professor Amsterdam has noted:

> "The problem with the graduated model, of course, is . . . that . . . it converts the fourth amendment into one Rorschach blot. The complaint is being voiced now that the fourth amendment law is too complicated and confused for the policeman to understand or to obey. Yet present law is a positive paragon of simplicity compared to what a graduated fourth amendment would produce. The varieties of police behavior and of the occasions that call it forth are so enumerable that their reflection in a general sliding scale approach could only produce more slide than scale. We would shortly slide back to the prescription stated in a now overruled 1950 decision of the court which is generally regarded as the nadir of fourth amendment development; That '. . . The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.' Under that view, (R)easonableness is in the first instance for the (trial court) . . . to determine' What it means in practice is that appellate courts deferred to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable. The ultimate conclusion is that 'the people would be "secure in their persons, houses, papers, and affects" only in the discretion of the police.' And as Mr. Justice Jackson reminded us, 'the extent of any privileges of search and seizure without

> warrant which we sustain, the officers interpret and apply themselves and will push to the limit." *Perspectives on the 4th Amendment,* supra 58 Minn. L. R. 393-394.

Alternatively, the reasonableness analysis might be reserved for those cases where the law was so unclear or the situation so novel, that only the actual decision in the case settled the issue. This would be analagous to the rule applied in *Wood v. Strickland,* 43 L. Wk. 4293, 4298 (1975) that:

> "The official must be acting sincerely and with the belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedy language of section 1983 in a case in which his action violated a students' constitutional rights, a school board member who has voluntarily undertaken the task of supervising the operation of the schools and the activities of the students must be held to a standard of conduct based not only on permissible intentions, but also on a knowledge of the basic unquestioned constitutional rights of his charges . . ."

The *Wood v. Strickland* approach would solve some of the problems of variability of standard. However, it is difficult to see what is gained by this approach. In essence, it returns us to the strict liability approach now taken in suppression cases. In a marginal number of cases, searches might be saved on the grounds that the law was unclear or the question novel. However, the price of saving these searches would be the injection of this new issue into suppression hearings, with the

debate raging not about the legal merits of the case, but about how clear the merits were before the case was decided.

The current strict liability approach does catch within its net certain cases where the deterrence rationale might be inapplicable because of the confused state of the law. However, this type of overbreadth is an unavoidable concomitant of the formulation of rules. As the court noted in *Gertz v. Welch:*

> "... because an ad hoc resolution of the competing interest at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus, it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority." 418 U.S. 343-344; cf. *Dandridge v. Williams,* 397 U.S. 471, 485 (1970).

If the exclusionary rule is to be maintained, and the purpose of exclusion is deterrence, then that purpose is best served by continuing the strict liability approach in suppression proceedings. Any other approach, except possibly the *Wood v. Strickland* approach, substantially diminishes the deterrent effect of the exclusionary rule. The *Wood v. Strickland* approach, would not be worth its cost. It would render the suppression process more complex, without any notable benefit to the police.

In addition to its deterrence function, the exclusionary rule has also been justified because of "the imperative of judicial integrity," *Elkins v. United States* 354 U.S. 206, 222 (1960). This imperative strongly counsels against any modification of the current standards for determining exclusion. Either a subjective

standard or a negligence test of good faith offers the police a substantial inducement to tailor their testimony to assure admission. Where mind states are involved such tailoring is easiest. The evidence is that the police will accept such opportunity. Non-suppression because of prevarication will by example encourage other officers to emulate those involved in the case where suppression was denied. Hence, the modified standards would encourage violation of constitutional rights. Here, the notion of judicial integrity becomes crucial. If the courts are sworn to uphold the constitution, at a minimum, this would suggest that it is not their function to encourage the invasion of constitutional rights.

(2)

In any event, the application of good faith standard in this case would not save the search. This court has already indicated that if a good faith standard is to be utilized, it will be an objective standard. *United States v. Peltier, supra,* 43 L. Wk. 4920-4922; *Michigan v. Tucker, supra*, 417 U.S. 447; cf *Scheuer v. Roads,* 416 U.S. 232, 247-248 (1974); *Wood v. Strickland, supra*, 43 L. Wk. 4296-4298. Under such a standard, suppression would only be denied when the police entertained a reasonable belief that they were acting in conformity with constitutional standards. No such reasonable belief was present in this case.

Both the trial court and the court of appeals found that the police did not have probable cause to believe that either seizable things or a person they were seeking were within Rice's house. The requirement of probable

cause is not a novel doctrine of which the police could be ignorant.

> ". . . all members of the police department, from the commissioner down to the raw recruit, are expected to be familiar with the principle that if the police intend to conduct a search of a man's home for a suspect, they must at least have probable cause to believe that he is on the premises. The doctrine is not subtle; it touches the very heart of law enforcement practices, and has found expression in numerous judicial opinions . . ." *Lankford v. Gelston*, 364 F.2d 197, 203 (4th Cir. 1966).

Probable cause exists when the quantum of facts is such that it would "warrant a man of reasonable caution" in a belief. *Carroll v. United States*, 267 U.S. 132, 162 (1925). Built into the concept of probable cause is a broad leeway for the police defined by the zone of reasonable belief. *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949); *United States v. Ventresca*, 380 U.S. 102, 108 (1965); *McCray v. Illinois*, 386 U.S. 300, 304-305 (1967). Thus, when the courts below found that the police lacked probable cause, they found that the police could not have reasonably believed that things which they sought were on the premises which they searched.

The police knew or should have known that they were required to have probable cause before they entered the premises to search. They did not have probable cause. They could not therefore, have entertained a reasonable belief that their entry was proper. Thus, under an objective good faith standard the search here was improper. The officers did not entertain a reasonable belief that dynamite would be found on Rice's premises or that Duane Peak was

secreting himself there. The police did not expect to find either dynamite or Peak at Rice's house. All they had was hope.

Lt. Swanson, the officer who obtained the search warrant, testified:

> "Well, one thing that had been troubling me all day, since the search of the Black Panther headquarters is that there was dynamite some place but we hadn't been finding it, and so it occurred to me at this time, a decision was made right there. I said 'Why don't we check this house for Duane Peak and we may find dynamite or something in there; and maybe we ought to see if we have the grounds that we can put together a search warrant.' That was about our thinking on that." (App. 43.)

Swanson's testimony provides a total answer to the application of any good faith exception concerning the presence of dynamite on the premises. In obtaining and executing the warrant, Swanson was not operating on a strong, subjective belief that he was complying with Constitutional requirements. Rather, he was trying to cover his case. He had no belief that dynamite was on the premises. However, if he got lucky and found dynamite, he wanted to be able to use it as evidence.

The situation concerning the expectancy that Peak would be found on the premises is identical. Lt. Swanson gives a full explanation of what brought the police to the residence at 2816 Parker Street. He testified that the police had knowledge that Peak, whom they were seeking, was a member of the NCCF. Rice was also a member of that organization. His house had been a periodic meeting place for NCCF members. (App. 15-16.) Peak was one of the members of that organization who had visited at Rice's house. (App. 26-27.)

The police had constructed a list of different places where Peak might be. As Lt. Swanson testifies:

> "At the time we had a list of houses as possibilities, plus getting new addresses from informants . . ." (App. 40.)

After the search of the NCCF headquarters, the large number of officers who had converged there were subdivided into smaller parties and were instructed by Lt. Perry to "proceed with their previously assigned houses." (App. 71-72.) As Lt. Swanson described the instructions, there were orders "To go to the known places of the NCCF and attempt apprehension of Duane Peak." (App. 35.)

The police testimony makes it clear that they did not believe that Peak was at 2816 Parker. Rather, they were conducting searches of a large number of places in the hope that they might find Peak. Thus, Lt. Swanson testifies:

> "Question. Did you have any report from anyone that Duane Peak was then inside the Rice house or had been inside the Rice house that day?
>
> Answer. No, sir. The only thing we had was a speculation because it was a known house of that particular group and he was a member of that group and it was a place where he might possibly be." (App. 44.)

He was specifically queried about information that Peak might have been in Rice's house within the last few days before entry. He testified that:

> "Question: At the time you made the search of the Rice house did you have any information from anyone as to where Duane Peak had actually been within the last day or two before your entry into the Rice house?

> Answer. I don't recall.
>
> Question. Now, was there anything that you now can recall to tie Duane Peak to the Rice house at the time you made the entry into the house other than your information that Duane Peak was a member of the NCCF, that David Rice was also a member of the NCCF, that Peak had been known to go to that house for meetings and otherwise? Now anything else?
>
> Answer. No that was about the information we had." (App. 44-45.)

Similarly, both Lt. Pfeffer and Lt. Perry, the other command officers who testified in federal court, had no specific information that Peak might be at Rice's house. (App. 66-67; 75.)

Lt. Swanson's testimony demonstrates that the police did not believe that Peak was at Rice's premises. If anyone would have had information linking Peak with those premises, it would have been Swanson, who commanded the intelligence unit (App. 15). It is clear from Pfeffer's testimony that he had no specific information about a relationship between Peak and Rice, but was merely relying on information provided by the intelligence division. Lt. Perry had seen Peak and Rice together, but that was six months before the event in question, when he served in the intelligence division. (App. 75-76.)

The police testimony shows that other probable hiding places of Duane Peak had not been eliminated when Rice's house was searched. Only three prior searches are mentioned. The search of the NCCF headquarters, the search of the home of one of Peak's uncles and a search of Poindexter's home. There is no evidence the police were working through a list of

places on the basis of an order of probability. The police did not know where Peak was. They knew he must be someplace. Their strategy was to search everyplace.

On the basis of the foregoing testimony, the Court of Appeals noted that:

> "... The testimony of the various police officers at the evidentiary hearing held before the District Court strongly suggests that the police had no evidence whatever that Peak was at petitioner's house and that *they were acting on nothing more than a hunch or random guess*. . ." 513 F.2d 1292 (Emphasis supplied.)

Again with regard to the search for dynamite the Court of Appeals states:

> "... Moreover, testimony before Judge Urbom suggests that *the purpose of searching for the explosives was an afterthought conceived after the police arrived at the house, rather than an urgent emergency, and that they decided to apply for a warrant to search for explosives in petitioner's house only because they had not discovered the dynamite in any of the other locations they had searched earlier in the day.*" 513 F.2d 1295 (Emphasis supplied.)

The Court of Appeals held that the State's good faith argument was not only legally invalid, but factually unsupported.

> "We consider it necessary to point out that the record discloses a widespread search for the suspect Peak and Poindexter which evinced at least a negligent disregard by the Omaha Police for Constitutional rights of not only petitioner but possibly other citizens as well. Such a police search is at least reminiscent of the police conduct

> condemned in *Lankford v. Gelston*, supra. We believe this is an appropriate case for the application of the exclusionary rule." 513 F.2d 1295.

B. To Allow Supplementation of a Defective Affidavit for a Search Warrant in a Subsequent Hearing on a Motion to Suppress Would Amount to an Elision of the Warrant Clause From the Fourth Amendment. In any Event, the Additional Information Upon Which Nebraska Relies Does Not Establish Probable Cause.

Nebraska argues that the police should be allowed to supplement a defective affidavit for a search warrant at a hearing on a motion to suppress. Brief of petitioner, pp. 41-44. Underlying this argument is the premise that the police demonstrate their good faith and allegiance to the Fourth Amendment whenever they seek a warrant. Therefore, suppression without examination of the cause which they in fact had is in fact unwarranted. Brief of petitioner, pp. 23-24.

The argument for supplementation of a defective affidavit completely ignores the warrant clause of the Fourth Amendment, and hence the central role which the magistrate plays in the protection of Fourth Amendments rights. Nor, is an inference of good faith warranted merely because a police officer seeks a warrant. This alteration of the exclusionary rule suggested by Nebraska would not serve the ends of the Fourth Amendment. Further, Nebraska's position that supplementation of the affidavit would save the search here is factually incorrect. The additional information

produced in the state court herein on the motion to suppress does not demonstrate the existence of probable cause to believe that dynamite was on the premises of 2816 Parker.

(1)

The second clause of the Fourth Amendment, the warrant clause, spells out the circumstances under which a magistrate may issue a search warrant. The second clause has been read as modifying the general mandate of the first clause against "unreasonable searches and seizures." Searches conducted outside the judicial process, that is, without the prior approval of a judge or magistrate, are treated as per se unreasonable under the Fourth Amendment, subject only to specific exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). The exceptions deal in the main with cases in which time is too short for officers to procure a warrant. *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 462 (1971). This requirement that, "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizens private premises or conversation" is "the very heart of the Fourth Amendment directive." *United States v. United States District Court*, 407 U.S. 297, 316 (1972).

This Court has often explained why the judgment of the magistrate plays such a centra role in the Fourth Amendment scheme. Thus in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), the court stated:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime." Cf *Gerstein v. Pugh*, __U.S.__ 43 L.Ed 2d 54, 64 (1975).

The requirements that the magistrate's judgment precede action takes on added significance when it is examined against the totality of the Constitution. The Constitution proceeds on the principle that the greatest safeguard against misuse of power is division of authority. If different persons have to cooperate before power can be exercised, then it is less likely to be abused.

> ". . . The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for vindication." *McNabb v. United States*, 318 U.S. 332, 343 (1943).

The due process clauses of the Fifth and Fourteenth Amendments are read as requiring, in the absence of an emergency, *Fahey v. Mallonee*, 332 U.S. 245 (1947), that governmental action which significantly invades personal or property rights be proceeded by some type of hearing. See *Nickey v. Mississippi*, 292 U.S. 393 (1934); *Op Cotton Mills v. Administrator, Department of Labor*, 312 U.S. 126 (1941). Under recent decisions of this court, process that results in the seizure of property is required to be preceded by judicial action

and cannot become final absent adversary process. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407, U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, __U.S.__, 42 L.Ed. 2d 751 (1974). In the case of a search warrant the Fourth Amendment defines due process. *Gerstein v. Pugh*, supra, 43 L.Ed. 2d 72, n. 27. However, the due process cases strongly counsel against removal of the threshold requirement of judicial approval prior to search or seizure. *Mitchell v. W. T. Grant Co.*, supra.

If the magistrates' role is to be meaningful, the justifications of the search must be limited to the information presented to him. If that information can be supplemented, the procurement of the warrant becomes a ritual, and the magistrate is reduced from judge to ceremonial figure. Since the requirement of the warrant derives directly from the second clause of the Fourth Amendment, the limitation of the justification to the information presented to the magistrate is bottomed in the Fourth Amendment. Thus, modification of the exclusionary rule to allow supplementation amounts to modification of the Fourth Amendment.

(2)

The mere fact that the police obtain a warrant does not demonstrate that a subsequent search is performed in a good faith belief that it complied with constitutional standards. The police are responsible for the contents of the affidavit upon which the warrant issued. They have at least a rudimentary familiarity

with the requirements of probable cause. Experienced policemen know their judges, and the police select the magistrate to whom the affidavit goes. Thus, good faith cannot automatically be assumed because a warrant is issued.

The magistrate need not be a lawyer, *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), and therefore, there is no guarantee that the magistrate will be better positioned than the police officers to make a legal judgment on the sufficiency of the affidavit. While the magistrate may be less zealous than the police, he may be no better informed. When the magistrate is a lawyer, generally he is a judge of an inferior court. This court has had occasion to comment on the heavy burden borne by misdemeanor courts, *Gerstien v. Pugh*, supra 43 L.Ed. 2d 70 n. 23; cf. Skolnick, *The Politics of Protest*, pp. 308-310. These busy judges probably have much less time to devote to examining the warrant, then the police do to preparing it. cf. Skolnick, *The Politics of Protest*, pp. 309-310. There is substantial evidence of a "pervasive tendency of magistrates to rubber stamp police warrant applications without adequate independent inquiry." Amsterdam, op. cit., Fourth Amendment, 58 Minn. L. Rev. 471, n. 32, and authorities there cited. Where more than one magistrate is available, even if most magistrates take seriously their responsibilities, the police can shop for their forum.[3]

---

[3]As we have already noted there is substantial police evidence of prevarication in search and seizure cases. Allowing supplementation of an affidavit would merely exacerbate this problem. "At least a presearch affidavit in support of a warrant application ordinarily deprives the officer of the benefit of hindsight after the search produces evidence in support of itself." Amsterdam, op. cit., Fourth Amendment. 58 Minn. L. Rev. 471-472, n. 532.

There is an additional value served by the requirement of demonstration of cause prior to search. There is always the

An alternative version of the good faith argument would allow admission of any evidence seized pursuant to a warrant, on the grounds that the police have established their good faith in obtaining the warrant. *Brown v. Illinois*, supra, 33 L. Wk. 4944 (concurring opinion). However, as we have already demonstrated, an inference of good faith cannot immediately follow from the fact that a warrant was obtained.

If issuance of the warrant made admissibility automatic, magistrates would be under a tremendous pressure to approve all warrants. While some would resist such pressure, judges in the inferior criminal courts deal with the police on a day to day basis. They become very sympathetic with the policemen's problems. Some of them view themselves as an arm of law enforcement, rather than as detached judicial officers. Skolnick, *The Politics of Protest*, pp. 313-316; Chevigny, *Police Power*, pp. 250-252. Given these pre-existing tendencies, many would accept the oppor-

---

danger that overzealous officers, unable to prove a case against the party they believe guilty, may seek to manufacture it by planting evidence. The requirement that cause be demonstrated prior to access to premises limits the chances of such misconduct.

In a supplemental brief he filed in the Nebraska Supreme Court and in a supplemental petition for habeas corpus, David Rice maintained his innocence and contended that his arrest, trial and conviction were politically motivated. The fact that the police investigation focused on Rice because of his political views lends credence to this charge. In a case such as this, where the police decided that Rice was involved and then sought evidence of involvement, and where the emotions of all members of the Omaha Police were deeply involved because a brother officer had been killed, the likelihood of improper police action is increased. The requirement of prior demonstration of cause serves as a partial check upon such improper action.

tunity to approve warrants simply because it would promote admissibility. The current rule inhibits such tendencies. The magistrate knows that approval of a defective warrant is superfluous. Thus the current rule tends to force the magistrate to perform his judicial task, even if he doesn't like it.

If the magistrate's ruling is final, would not the arguments that due process cases should not be applied in the search and seizure context because the Fourth Amendment defines due process collapse? If it did, then it would appear that, in the absence of an emergency, the party whose property was to be searched would be entitled to an opportunity to appear and contest the showing of probable cause. If such opportunity were not granted, this would leave personal rights guaranteed by the Fourth Amendment and property rights in land invaded and things seized with substantially less protection than is generally accorded property under the due process clauses of the Fifth and Fourteenth Amendments. Moreover, the procedure to grant the warrant, since it would not be unreviewable, might be a critical stage in the proceedings. See *United States v. Wade*, 388 U.S. 218, 226-227 (1967). While a critical stage argument might be avoided, either on the grounds that an unlawful search does not interfere with "the accused's right to a fair trial," *United States v. Wade*, supra, 388 U.S. 226, or, in cases in which charges have not yet been filed, on the grounds that adversary judicial proceedings have not yet been initiated, *Kirby v. Illinois*, 406 U.S. 682 (1972), this would create a situation in which vital personal rights of the accused were invaded without giving him the opportunity to be heard or to have counsel present.

In the net, if a search is validated whenever a magistrate approves it, the warrant becomes "a 'cure all' and the Constitutional guarantee against unlawful search and seizure could be said to be reduced to 'a form of word.' " *Brown v. Illinois*, supra, 43 Law. Wk. 4941.

Finally, there is a general point which we believe must be made about any modification of the exclusionary rule. All of the cases, which have advanced the good faith rationale, have dealt either with collateral uses of the tainted evidence, with inadmissibility in the case in chief, or with retroactivity problems. See, *United States v. Calandra*, supra; *Michigan v. Tucker*, supra; *United States v. Peltier*, supra. More generally, when this Court has discussed the efficacy of deterence, it has done so in the context of requests for extension of an exclusionary rule. *United States v. Calandra*, supra; *Harris v. New York*, 401 U.S. 222, 225 (1971); *Oregon v. Hass*, __U.S.__ 43 Law Wk. 4417, 4420 (1975). Where extensions of such rules are involved, "assuming that the exclusionary rule has a deterrent effect on prescribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Harris v. New York*, supra. However, where a retrenchment on an exclusionary rule is proposed, the context significantly varies. The impact of a retrenchment on police conduct will largely depend upon police perception of the motivation of the retrenchment. A significant modification of the exclusionary rule could leave law enforcement officials with "the impression, however erroneous, that all Constitutional restraint on police had somehow been removed–that an open season on 'criminals' had been declared." *Bivens v. 6 Unknown Federal Narcotics Agents*, 403 U.S. 388, 420-421

(1971) (dissenting opinion). This likely misperception would leave the deterrent value of the residue of the exclusionary rule nil.

(3)

The additional information presented in the state court suppression hearing demonstrated that the tip on which the police acted was even less substantial than the affidavit indicated. In addition, it demonstrated that the tip was stale. None of the additional facts presented in the suppression hearing went to establish the presence of seizables at Rice's residence.

The District Court had available to it the testimony in the state court. With regard to the additional evidence concerning the tip, a matter to which the Nebraska Supreme Court did not avert, the district court noted:

> ". . . The source of their information concerning the presence of dynamite in David Rice's house was a tip that was given to the police at least three weeks and perhaps as long as two and one half months prior to the entry of Rice's house. Moreover the tip itself was not very positive about the dynamite being at Rice's house. At the hearing on the motion to supress in the state criminal trial, Lt. (then Sgt.) Swanson testified as follows concerning the tip: 'I was told at one time that if there was dynamite in town and if the NCCF had it, that David Rice's house would be one of the places that might store it.' . . .
>
> Finally, there is no evidence in the entire record as to the reliability of the informant who gave this tip." 388 F.Supp. 201

The tip itself was weakened rather than strengthened by the additional evidence. Instead of the positive averment in the affidavit "We have been told in the past that Rice keeps explosives, at his residence . . ." the tip now becomes "David Rice's house would be one of the places they might store it."

The original affidavit for the search warrant did not indicate when the tip had been received. Swanson's testimony at the hearing on the motion to suppress shows that it was at least several weeks, and possibly several months old. After the hearing on the motion to suppress, the tip runs afoul of the rule that in order to justify a finding that property is probably upon the premises to be searched, the information "must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro v. United States*, 287 U.S. 206, 210 (1932).

The other information in the hearing on the motion to suppress, which the Nebraska Supreme Court used to buttress the defective affidavit, 188 Neb. 738-739, 199 N.W.2d 487-488, merely supports the averments in the affidavit that:

> "(1) David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of police officers.
>
> (2) A violent killing of a police officer occurred in Omaha and arrests were made from the membership of NCCF."

However, these two averments were not rejected by either the district court or the court of appeals. Rather, both courts held that the averments were insufficient to demonstrate probable cause to believe that dynamite was on Rice's premises or to corroborate the tip. Thus, the Court of Appeals stated:

> "The averments of the affidavit that petitioner was a member of the NCCF and that the NCCF members had already been arrested in the case possibly enhanced the suspicion that the petitioner in some way was involved in the bombing plot, but these allegations do not serve to independently corroborate the tip that weapons and explosives were in petitioner's house." 513 F.2d, 288.

Similarly, the district court held:

> ". . . In Rice's case, the averment that he is a member and minister of information of the NCCF which advocates the violent killing of police, that a policeman had been killed, and that arrests had been made from the membership of the NCCF, in no way suggests that dynamite would probably be stored in the petitioner's house. Perhaps such averments made it more likely that dynamite would be found in Rice's house than the house of someone else whom an unnamed informant accused of storing dynamite and about whom nothing else was known. But they do not lend sufficient support to the tip to permit suspicion to harden into a judgment that dynamite was probably in Rice's house. Mere advocacy does not in and of itself license the police to search the premises of the advocate. Such activity, provided it does not involve incitement to specific acts, is Constitutionally protected free speech. *Yates v. United States*, 354 U.S. 298, 318-319 (1957). The violent killing of a police officer would certainly render suspect a group advocating the violent killing of police. The fact that arrests had already been made from the group would further heighten suspicion of involvement in the crime by the group. The strongest implication, however, that can be drawn from these assertions is that dynamite probably was on the premises of some member of the group at some time. They do not

imply that the dynamite was probably on Rice's premises at the time the warrant was sought. It is this latter inference that the standard of probable cause requires to be made. *Brinegar v. United States,* 338 U.S. 160 (1949). The only averment besides the tip that singles the petitioner out is the one that he is minister of information. Being minister of information does not imply that one probably stores dynamite and other illegal weapons. Perhaps if the allegation were that Rice is weapons minister or something of that sort, it would heighten the inference down to a particular place. *The key failing of the averments, then is that they fail to tie down the storage of dynamite to any particular place.* Such particularity is required before a search warrant may issue." (Emphasis supplied). 388 F.Supp. 192-193.

The additional information which the police had was a mere elaboration of the basic allegations of the affidavit with regard to Rice's membership in the group and the involvement of members of the group in the killing. 388 F.Supp. 197-198. It suffers from the same defect as the affidavit itself, that is, the failure "to tie down the storage of dynamite to any particular place." If the affidavit could be supplemented, the result in this case would not be changed. The additional information which Nebraska pressed upon its own courts, and which the federal courts refused to consider, does not demonstrate the probable cause lacking in the affidavit.

C. The Proposed Reasonableness Under the Circumstances Test, Which Would Not Require the Police to Have Probable Cause Before They Made an Entry to Search, Would Totally Eviscerate the Protection of Privacy Provided by the Fourth Amendment. In any Event, the State's Argument that the Police Search Here was Reasonable has no Basis in the Facts.

(1)

Nebraska argues that the exclusionary rule should be modified so as to judge police conduct of a search by reasonableness under the circumstances. Petitioner's brief pp. 39-41. The burden of this argument is that the presence or absence of probable cause is irrelevant to a judgment as to whether or not a search was reasonable. The argument is bottomed on the fact that the phrase "probable cause" is not present in the first clause of the Fourth Amendment which secures the people against "unreasonable searches and seizures," but is found only in the second or warrant clause. This argument misses the point of the Fourth Amendment.

Independent of its position in the warrant clause, the concept of probable cause is implicit in the concept of a reasonable search. The Fourth Amendment protects against intrusive invasions of privacy. Within a zone measured by his reasonable expectation of freedom from governmental intrusion, *Mancusi v. DeForte,* 392 U.S. 364, 368 (1968); *Katz v. United States,* 389 U.S. 347, 351-352 (1967), a person is in seclusion and may expect to be left alone. Outside such a zone of seclusion, he is in public, and the agents of the

government may see whatever is exposed to public view. *Hester v. United States,* 265 U.S. 57 (1924). The expectation of privacy is not absolute. It is defeasible where the governmental interest in invading the secluded area overbears the interest in seclusion. *Camara v. Municipal Court,* 387 U.S. 523, 534-537 (1967); *Terry v. Ohio,* 392 U.S. 11, 20-22 (1968). That is, the interest in privacy is defeated when the governmental interest in intrusion renders entrance reasonable.

If an act is to be judged reasonable, then there must be some reasons for the act. However, not just any reasons will do. The reasons advanced for the act must be sufficient to justify it. That is, there must be some rational relationship between the act performed and the reasons advanced to justify it. A search is undertaken to find something. The reasons advanced for a search must be reasons which justify the beliefs that the things sought are in the places to be searched. If those reasons are to be deemed sufficient, they must be reasons which would pursuade a reasonable man to believe that the things sought can be expected to be in the place searched. But, that is the definition of probable cause. *Carroll v. United States,* 267 U.S. 132, 162 (1925). Therefore, separate from its position in the second clause of the Fourth Amendment, the requirement of probable cause is implicit in the first clause whenever a search is involved. *Camara v. Municipal Court,* supra, 387 U.S. 535.

The justification for a search is the expectation of finding something, that is, the governmental interests to be weighed against the expectation of privacy in order to determine whether the governmental interest reasonably justifies the search. If the police have no reasonable

expectation of finding something, there is no governmental interest which justifies their entrance. The governmental interest is in the police finding what they seek, that interest only justifies their going where they can expect to find it.

It may be that we have misunderstood Nebraska's argument. Perhaps the intended argument runs something like this. Probable cause is measured by reasonable belief. In determinig whether a belief is reasonable, not only evidence in favor of holding it, but also the consequences of rejecting it must be evaluated. In an emergency situation, where consequences of an action are extremely grave, a beilef may be reasonable, even though it would not be under less stringent circumstances. In other words, the standard of probable cause is invariant, but its application is situationally rooted.

If that is Nebraska's argument, it is unexceptional. It is also totally irrelevant to the facts of this case. The police had reason to believe that Duane Peak was in Omaha. They may also have had reason to believe that there was more dynamite in the community, but the basis of this belief appears nowhere in the record. However a reasonable belief that what is sought is somewhere does not justify searching everywhere.

> "... In a criminal investigation, the police may undertake to recover specifics stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently a search for these goods, even with a warrant, is 'reasonable' only where there is 'probable cause' to believe that they will be uncovered in a particular dwelling." *Camara v. Municipal Court,* supra 387 U.S. 535.

(2)

To demonstrate grounds for belief that explosives were at Rice's house, the State can point only to a stale and equivocal tip from an unknown source of unknown reliability. The police had no basis for believing that Peak was in the house. Nor were the police acting in an emergency. As the Court of Appeals noted, the argument that an emergency existed was completely refuted by the actual conduct of the police at the time of the search.

> "The conduct of the police upon arrival at petitioner's home, however, errodes the exigent circumstance argument. After receiving no response to their knock on the door, the officers decided to obtain a search warrant. After a delay of more than an hour the police finally entered the house, eventually discovering the dynamite and other items admitted at trial.

The delay of more than an hour before entering the dwelling impairs the State's contention that the police were constrained by a sense of urgency to act swiftly, without regard to the mandate of the Fourth Amendment. Nor, apparently, did the police make any attempt to protect neighboring residents in the area from any asserted danger of explosion. Moreover, testimony before Judge Urbom suggests that the purpose for searching for explosives was an afterthought conceived after the police arrived at the house, rather than an urgent emergency, and that they decided to apply for a warrant to search for explosives in petitioner's house only because they had not discovered dynamite in any of the other locations they had searched earlier in the day.

As for the apprehension that Peak was being killed, the delay of more than an hour before

> entering the house greatly attenuates the force of this argument." 513 F.2d 1294-1295.

Under the evidence in this case, Nebraska's argument for reasonableness reduces to an argument that police may search premises in a situation where neither life nor property is in danger and where there are no grounds for belief that either a seizable person or a seizable thing is on those premises. If that is the reasonableness test which the State seeks to have applied, then whatever the police do is reasonable.

The search for Peak was founded "on nothing more than a hunch or random guess." The search "for explosives was an afterthought . . . because they had not discovered dynamite in any of the other locations they had searched earlier in the day." Where no emergency exists, where life is not threatened, where property is not in danger, hunch, conjecture, and afterthought do not justify setting at naught human rights specifically protected by the Constitution. As the district court noted:

> ". . . The privacy of one's home and the concomitant ability to decide whom it shall shelter and when is one of the most precious rights we possess as citizens. Entry into the home by police absent probable cause to so enter is precisely what the Fourth Amendment forbids. Apprehension of a dangerous criminal outweighs this interest in the privacy of one's home only if there is probable cause to believe that the criminal is in the home." 388 F.Supp. 202.

II.

THE COURTS BELOW CORRECTLY HELD THAT RICE EXHAUSTED HIS STATE REMEDIES ON THE ISSUES OF POSSIBLE JUSTIFICATIONS OF THE SEARCH AT 2816 PARKER BECAUSE OF THE EXISTENCE OF EXIGENT CIRCUMSTANCES OR THE POSSESSION BY THE POLICE OF AN ARREST WARRANT FOR DUANE PEAK.

Having held that the search at 2816 Parker could not be justified by the warrant, the district court was then faced with the issue of whether or not it could pass upon the alternative justifications offered by Nebraska for the search. In the Supreme Court of Nebraska, Rice had attacked the validity of the search warrant used to justify the search. The State defended the warrant but argued alternatively that the search could be justified either by exigent circumstances or by possession of the arrest warrant for Duane Peak. Since the Supreme Court upheld the validity of the warrant, it did not pass upon the alternative justifications for the search. Nevertheless, the district court held that the exhaustion requirement of 28 U.S.C. Sec. 2254 had been satisfied on these issues. Its holding was affirmed by the court of appeals. These rulings on exhaustion are clearly correct.

This Court has placed the prerequisite of exhaustion on an alternative double aspect. Petitioner may demonstrate satisfaction of the exhaustion requirement either by showing that the question he seeks to litigate in the federal habeas proceeding had already been presented to the highest court of the state or by showing that he has no clearly available state remedy.

On either of these alternative aspects Rice has satisfied the requirement of exhaustion.

The requirement of exhaustion does not require repetitious applications in the state courts, *Humphrey v. Cady*, 405 U.S. 504, 516 N. 18 (1972); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971). The test for exhaustion is whether the state courts have been given an opportunity to pass upon the issue, not whether they have in fact passed upon it. *Picard v. Conner*, 404 U.S. 270, 275 (1971); *Sanders v. United States*, 373 U.S. 1, 16 (1963). Once there has been presentation, the requirement of the exhaustion test was met. *Humphrey v. Cady*, supra, 405 U.S. 516, fn. 18.

In this case, the alternative justifications for the search were fully briefed and argued in the Nebraska Supreme Court by both the State and Rice. Those issues were not addressed by the Supreme Court of Nebraska because they became superfluous when the court held the warrant valid. Nevertheless, there was full presentation.

Alternatively, it is clear that at the time he filed his petition for habeas corpus, Rice had no available state remedy. The exhaustion requirement is to be measured as at the time of filing of the writ. *Fay v. Noia*, 372 U.S. 391, 435 (1963); *Humphrey v. Cady*, 405 U.S. 504, 516 (1972). On the date upon which Rice filed his application for the writ, there was no way in which the alternative grounds for validating the search could have been litigated in the Nebraska courts. So long as the Nebraska courts held the warrant valid, the presence or absence of exigent circumstances or the validity or invalidity of the search insofar as it could be supported by the arrest warrant for Peak were irrelevant. Even if there were no exigent circumstances and the search

could not be justified because of the possession of the arrest warrant, in Nebraska the search was still valid.

The decision by the district court that the warrant was invalid opened up a new avenue of relief in the Nebraska state courts, if they chose to accept the district court's decision. However, since that avenue of relief did not exist at the time of filing, it was not an avenue which Rice needed to pursue. *Roberts v. Lavallee*, 389 U.S. 40, (1967); *Francisco v. Gathright*, __U.S.__, 42 L.Ed.2d 226, (1974).

III.

THE DISTRICT COURT HAD JURISDICTION UNDER 28 U.S.C. § 2254 TO ENTERTAIN RICE'S PETITION FOR HABEAS CORPUS AND TO GRANT HIM THE RELIEF WHICH HE SOUGHT.

In *Brown v. Allen*, 344 U.S. 443 (1953) and again in *Fay v. Noia*, 372 U.S. 391 (1963) this Court held that the habeas corpus jurisdiction of the district court reached any case in which the claim was made that a state conviction was infected with constitutional error, that is, any state case in which controlling federal constitutional law had been misapplied. When *Mapp v. Ohio*, supra, made the exclusionary rule applicable to the states, that holding brought state search and seizure cases within the ambit of § § 2254. Following on *Mapp*, the courts of appeals began to entertain state search and seizure cases without any qualms about jurisdiction. *Hall v. Warden*, 313 F.2d 483 (4th Cir. 1963); *U.S. ex rel Linkletter v. Walker*, 323 F.2d 11 (5th Cir. 1963), aff. 381 U.S. 618 (1965); *California v. Hurst*, 325 F.2d

891 (9th Cir. 1963); *U.S. ex rel Anglet v. Fay*, 333 F.2d 12 (2d Cir. 1964); *Sisck v. Lane*, 331 F.2d 235 (7th Cir. 1964); *Hubbard v. Tinsley*, 336 F.2d 854 (10th Cir. 1964); *Burnside v. Nebraska*, 346 F.2d 88 (8th Cir. 1965). *In Henry v. Mississippi*, 379 U.S. 443, 452 (1965) this Court intimated that the view on jurisdiction which the courts of appeals were taking was correct. It confirmed the jurisdiction in *Linkletter v. Walker*, 381 U.S. 618 (1965) by deciding that case on the merits.

Linkletter was a habeas corpus case. If a conviction obtained through the use of illegally seized evidence did not come within the habeas corpus jurisdiction, the courts appealed from would not have had jurisdiction. *Carfer v. Caldwell*, 200 U.S. 293 (1906); *Matters v. Ryan*, 249 U.S. 375 (1919). Since this Court's jurisdiction depends upon that of the courts below, it would not have had jurisdiction to reach the merits. *Mansfield, C.& L.M.R.R. v. Swan*, 111 U.S. 379,382 (1884); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 70 (1940). Since this Court reached the merits, it necessarily determined that federal habeas corpus is available for a prisoner claiming his conviction was obtained through the use of evidence procured in violation of the Fourth Amendment. *United States v. Haley*, 371 U.S. 18 (1962); *Thornton v. United States*, 368 F.2d 822, 828-829 (majority opinion), 831 (dissenting opinion) (D.C. Cir. 1966); *Wilson v. Porter*, 361 F.2d 412, 416 (9th Cir. 1966). Since *Linkletter*, this Court has consistently taken jurisdiction over habeas corpus cases involving state prisoners claims of 4th Amendment violation. *Warden v. Hayden*, 387 U.S. 294 (1967); *Carafas v. LaValle*, 391 U.S. 234 (1968); *Mancusie v. DeForte*, 392 U.S. 364 (1968); *Schneckloth*

v. Bustamonte, 412 U.S. 218 (1973) cf. *Kaufman v. United States*, 394 U.S. 217 (1969).

Now, more than twenty years after *Brown v. Allen* and ten years after *Linkletter v. Walker*, Nebraska argues that the federal habeas corpus jurisdiction should be modified by excluding search and seizure cases from its reach. Brief of petitioner, at 45-51. We believe that adoption of the position there taken, that federal habeas corpus in search and seizure cases should be limited to situations in which the petitioner has been denied a fair opportunity to litigate the search and seizure issue in the state courts, constitutes an impermissible interference with Congressional authority over the jurisdiction of the lower courts. The remedy, if adopted, would remove from federal habeas precisely the type of cases where habeas is most necessary to vindicate Constitutional rights. The modification would substantially interfere with the operation of the exclusionary rule in the type of case in which it is most likely to perform its deterrent function. And the proposed modification is unsound, since it cuts deeper than the evil at which it is aimed. In any event, elementary considerations of fairness dictate that any change in the habeas jurisdiction in search and seizure cases be applied prospectively only.

A. Adoption of the Fair Opportunity Limitation on Federal Habeas in Search and Seizure Cases Would Constitute an Impermissible Interference With the Legislative Authority of Congress. If Such a Change in the Historic Reach of Federal Habeas is to be Made, the Change Should Emanate From Congress.

> "* * * The Fourteenth Amendment does, after all, direct supervening commands to the state in the management of their criminal law; the Constitution does not accept the state process as 'complete'. The creation of a remedial framework to assure effective implementation of these commands is, therefore, one of the important tasks of our system * * *" Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 445-446 (1963)

"The creation of a remedial framework to insure effective implementations of these commands" is a task assigned in the first instance to the Congress. Collings, *Habeas Corpus for Convicts—Constitutional Right of Legislative Grace?*, 40 Cal. L. Rev. 346, 356-357 (1952); Pollack, *Proposal to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 Yale L.J. 50, 63-65 (1956); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Congress performed that function when it enacted the Habeas Corpus Act of 1867. What this Court did in *Brown v. Allen* was to recognize that "in 1867, Congress changed the common law rule" by extending the writ of habeas corpus to cases where a person is restrained in violation of the Constitution, *United States v. Hayman*, 342 U.S. 205, 211 (1952) and to take seriously the language which Congress used "violation of the Constitution."

As Collings notes:

> "Even a superficial study of federal habeas corpus will bring to light the hard facts that the power to issue the writ, like nearly every other power of the federal courts, stems from statute rather than from the Constitution. The Constitution empowers Congress to make exceptions from and regulate appellate jurisdiction of the Supreme Court, and to establish inferior courts. It naturally

> follows, in the absence of a specific guarantee of habeas corpus, that Congress has power to provide for the writ and to regulate its scope and procedure. This has been the holding of the Supreme Court practically from the beginning of the government." Collings, op. cit., 40 Cal. L. Rev. 346.

If "Congress has power to provide for the writ to regulate its scope and procedure, then once Congress had done so, the appropriate form in which to seek change in that "scope and procedure" is the Congress. Such change has regularly been sought since 1954, but has not been forthcoming. Appropriate deference to the legislative function of the Congress with regard to Article III jurisdiction mandates that the modification suggested in *Schneckloth v. Bustamonte* be addressed to Congress. *Brown v. Allen* has been the law for 22 years. It marked the culmination of a process of evolution, rather than a startling revolution in federal law. It achieves the will of the Congress in enacting the Habeas Corpus Act of 1867. If *Brown v. Allen* is to be overruled, either in whole or in part, it is the function of Congress to overrule it.

1. The original history and subsequent evolution of §§2254 fully support the jurisdiction of the district court over a state petitioner's habeas corpus action grounded upon a claim of improper denial of the suppression remedy.

Habeas corpus jurisdiction was granted to the District Court by the Judiciary Act of 1789. That act provided that:

> "* * * Judges of the District Court, shall have power to grant writs of *Habeas Corpus* for the purpose of an inquiry into the cause of commitment.–*provided*, that writs of *Habeas Corpus* shall in no case extend to prisoners in gaol unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. 81

There are two notable points about this original grant. Firstly, the grant did not reach State prisoners, unless the writ of habeas corpus ad testificandum was issued. *Ex parte Dorr*, 3 How. 103 (1845); Bator, *"Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,"* 76 Harv. L. Rev. 441, 465 (1963). Secondly, the original statute did not define the grounds upon which the writ would issue. Bator, op. cit., 76 Harv. L. Rev. 465-466. Because the common law writ was named, but the grounds of its issuance were not stated, this Court used common law doctrine to define the scope of the grant. *Ex parte Bollman*, 4 Cranch 75, 93-95 (1807); *Ex parte Watkins*, 3 Pet. 193, 201-202 (1836).

Until after the Civil War, with additions not here relevant, the original Judiciary Act remained the fount of habeas corpus jurisdiction. Bator, op. cit., 76 Harv. L. Rev. 465, n., 46. The period during which the first Judiciary Act governed habeas corpus was a time of only limited federal jurisdiction.

> "During more than seventy years following the first Judiciary Act of 1789, Congress acted substantially on the principle 'that private litigants must look to the state tribunals in the first instance for vindication of federal claims, subject to limited review by the United States Supreme

Court.' It was not then supposed that the necessary and proper place for the trial litigation of all issues of federal law was in the lower federal courts, and no general federal question jurisdiction was given those courts. Original civil diversity jurisdiction was given, and civil removal jurisdiction was allowed in three classes of cases, where it was particularly thought that local prejudice would impair national concerns. But care was taken to exclude the federal trial courts from involvement in state criminal process, and section Fourteen of the Judiciary Act expressly excepted state prisoners from the federal habeas corpus power." Amsterdam, *"Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,"* 113 Univ. of Penn. L. Rev., 793, 805-806 (1965).

The Civil War brought about a total reversal of views as to the appropriate roles of state and federal courts where questions of federal law were involved. *Steffel v. Thompson,* 415 U.S. 552, 463-464 (1974); *Zwickler v. Koota,* 389 U.S. 241, 245-247 (1967).

> "From this sweep of history it appears the Civil War radically altered the view which the national legislature had previously taken that generally the state legislatures, courts, and executive officials were the sufficient protectors of the rights of the American people. The assumption was abandoned that the state courts were the normal place for the enforcement of federal law, save in rare and narrow instances where they affirmatively demonstrated themselves unfit or unfair. Now the federal courts were seen as the needed organs, the ordinary and natural agencies, for the administration of federal rights. This is apparent in the grant of federal question jurisdiction in 1875. But, it is in the realm of civil rights, prime concern of the

> reconstruction Congresses and to them the patent sempiternal battleground of state the national authority, that the reversal of attitude was complete and completely expressed in law. The thirteenth, fourteenth and fifteenth Amendments wrote in to the Constitution broad new guarantees of liberty and equality in which the federal government committed itself to protect the individual against the States. The four major civil rights acts contained jurisdictional provisions making the federal courts the front line of federal protection. Power was given those courts in civil actions to enjoin or redress every deprivation by the states of 'rights, privileges, or immunities secured by the Constitution,' using every remedial device known to federal law. Habeas corpus, 'the most celebrated writ in English law' was given the federal judges 'in all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law.' 'Is it impossible to widen this jurisdiction.' No longer chary of interfering in state criminal prosecutions which had proven potent instruments of harassment, Congress enacted criminal removal statutes in 1863 and 1866 covering cases arising out of the War, in 1864 and 1866 covering cases arising out of enforcement of the wartime revenue acts, in 1866 covering cases of all persons prosecuted for acts under color of authority of civil rights laws and all persons who could not enforce their newly given civil rights in state Courts, in 1871 covering voting enforcement cases. Indeed, in 1866, it took the extraordinary step of opening the federal courts to original criminal prosecutions under state law where the prosecutions affected persons who could not enforce those rights in the state courts." Amsterdam, op. cit., 113 Univ. of Penn. L. Rev., 828-829.

As Amsterdam notes, part of the change in the pattern of Federal jurisdiction, which followed the Civil War, was the enactment of a new habeas corpus act. That act, 14 Stat. 385, Ch. 28, 1, provided that:

> "The several Courts of the United States * * * within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or laws of the United States * * *"

That language, substantially unaltered, is now contained in 28 U.S.C. §2254.

The new habeas corpus legislation differs from the original legislation in two vital respects. Firstly, it now reached state prisoners. Secondly, the new act did not merely refer to the writ, leaving the grounds for its issnance to be inferred from the common law. It explicitly stated the grounds upon which the writ would issue, "custody in violation of the constitution or laws or treaties of the United States * * *".

The 1867 Act is marked departure from the original act. The courts are no longer left dependent upon the common law for the grounds of habeas corpus. Grounds are stated. Thus, as this Court has often recognized, whatever the scope of the common law writ may have been, the scope of federal habeas corpus is to be determined from the language Congress used in granting jurisdiction. *Johnson v. Zerbst,* 304 U.S. 458, 465-466 (1938); *Walker v. Johnston,* 312 U.S. 275, 285 (1941); *United States v. Hayman,* 342 U.S. 205, 211 (1952).

It is difficult to conceive of language broader than that used in granting jurisdiction. All custody in violation of the Constitution or laws or treaties of the United States" is reached. As this Court noted, when it

first had occasion to consider the 1867 Act, in *Ex parte McCardle,* 73 U.S. 318, 325-326 (1868),

> "This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws."

As the Court went on to note,

> "It is impossible to widen this jurisdiction." 73 U.S. 326.

The debate on the act was quite limited in both Houses. (The legislative history is reviewed in Amsterdam, op. cit., 113 U. of Penn. L. Rev. 819-825; and in Myers, *The Habeas Corpus Act of 1867; The Supreme Court As Legal Historian,* 33 U. of Chi. L. Rev. 31 (1965). What discussion there is, however, bears out the broad gloss this Court gave to the Act in *McCardle.* Thus, Congressman Lawrence of Ohio, in explaining the bill on behalf of the House Judiciary Committee, stated:

> "* * * This bill has been introduced, the effect of which is to enlarge the privilege of hobeas (sic) corpus and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be confirmed upon them. It is a bill of the largest liberty, and does not interfere with persons in military custody or restrain the writ of habeas corpus at all * * * Cong. Globe, 39th Cong. 1st Sess. 41, 51 (July 25, 1866).

Similarly in the Senate, Senator Trumble of Illinois explained that:

> "I will state to the Senator of Kentucky, which he is probably aware of, that the habeas corpus act of 1789, to which the bill in an amendment,

confines the jurisdiction of the United States courts in issuing writs of habeas corpus to persons who are held under United States laws. Now, a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case, the benefit of the writ, and we agree that he ought to have recourse to the United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States." Cong. Globe, 39th Cong. 1st Sess. 32, 29 (July 27, 1866).

As Amsterdam summarizes the legislative history:

> "Floor discussion of the Act of 1867 was thus quite limited. But its proponents told the Congress all that seemed necessary when they explained its purpose to 'give recourse to the United States courts' in cases of federally illegal detention, and to expand the habeas corpus jurisdiction to its constitutional limits. * * *" Amsterdam, op. cit., 113 Univ. of Penn. L. Rev. 823.

Myers argues that the draftsman of the 1867 Act did not contemplate its application to persons convicted by a state court. That this possible application was not specifically in the minds of those who sponsored and supported the act is not surprising, since as Myers notes:

> "Even the possibility of a state prisoner being held in violation of the constitution was remote. The Constitution in 1866 contained no provision protective of the state criminal defendant against procedural injustice, other than the prohibition against bills of attainder. No state conviction had ever been set aside by the Supreme Court on any ground other than that the statute creating the defendant's offense was an unconstitutional inva-

> sion of power's reserved to the national government or in conflict with exercise of the federal power. There was, thus, in effect no possibility of a state prisoner being held in violation of a constitutional procedural right. * * *" Myers, op. cit., 33 Univ. of Chi. L. Rev. 44-45.

Others have read the history of the act differently.

> "It is impossible to read these debates of the Thirty-Ninth Congress without concluding that the Federal legislatures were intensely aware of the hostility and antiunion prejudices of the Southern state courts, and of the use of State Court proceedings to harass those whom the Union had an obligation to protect." Amsterdam, op. cit., 113 Univ. of Penn. L. Rev. 825; Cf. *Fay v. Noia*, 372 U.S. 391, 415-417 (1963)

However, assuming that Myers' gloss on the history of the statute is the proper one, it is difficult to see its relevance. As his comments demonstrate, if Congress did not foresee application of the Habeas Corpus Act of 1867 to convicted state prisoners, that was because it could not foresee the reach which the due process clause of the Fourteenth Amendment would eventually have in state criminal cases. However, in the Act of 1867, unlike the Act of 1789, Congress did not choose to wed the habeas corpus jurisdiction to historically limited language. Rather, it made the jurisdiction coterminous with imprisonment in violation of the Constitution. Habeas corpus jurisdiction over state prisoners was made a function of the Constitution and was set free to vary with the growth of the federal constitutional rights of those charged with crime in state courts.

> "* * * The Act of 1867 provided broadly that federal courts should 'have power to grant writs of habeas corpus in all cases where any person may

be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.' The limits of federal concern with the civil and criminal law of the States were thus staked at the boundaries of the privileges and immunities, equal protection, and due process of legislation and adjudication." Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev., 1, 20 (1956)

Turning now to Bator's article, it is difficult to see the relevance of his study. His ultimate conclusion on the Habeas Corpus Act of 1867 is that"

> "Read in the context of its time, the statute may at most be regarded as ambiguous with respect to what matters would be deemed to render a detention and lawful under Federal Law . . ." Bator, op cit, *Finality in Criminal Law,* 76 Harv. L. Rev. 477.

He attempts to cure the ambiguity by reading the Act of 1867 against the backdrop of pre-1867 habeas corpus practice. However, the adequate opportunity doctrine for which he opts, clearly departs from pre-1867 habeas corpus practice, since it looks behind the jurisdiction of the sentencing court. Bator, op cit, *Finality in Criminal Law–*, 76 Harv. L. Rev. 466. Moreover, Bator's study demonstrates that post 1867 Habeas was considerably broader in scope than the pre-1867 writ. Bator, op. cit, 76 Harv. L. Rev. 466-468. While in some instances, the cases were decided under the 1789 Act rather than the 1867 Act, this was because the court in effect read the later act into the earlier. See Collings, *Habeas Corpus for Convicts–Constitutional Right or Legislative Grace*?, 40 Cal. L. Rev. 335, 352 (1952). Thus, it is difficult to follow Bator's argument that the 1867 Act should be read as if

it merely continues the pre-1867 habeas corpus practice, when his own study demonstrates that it was never given that reading.

In the 1867 Act, Congress gave jurisdiction over all imprisonments in violation of the Constitution. It intended the literal reach of the language it used. It intended that that reach be defined by the definition which this Court gives to the Constitution. Once, however, this Court determines that a particular constitutional right must be recognized by the States , then failure to recognize that right in a state process brings a convicted person within the ambit of of the 1867 Act. When this Court in *Mapp* made the exclusionary rule binding on the states, it brought cases such as this one within the habeas corpus jurisdiction of the district courts. Bender, *The Retroactive Effect of an Overruling Constitutional Decision, Mapp v. Ohio,* 100 U. Penn. L. Rev. 650, 656-657 (1962); Amsterdam, *Search, Seizure and Section 2255; A Comment,* 112 U. Penn. L. Rev. 378, 379-380 (1964).

Just as this case comes within the original intent of the Habeas Corpus Act, so also, it comes within the interpretation of that Act by this Court, as it is evolved from the time of the passage of the Act.

> "It was many years before the full potentials of the 1867 Act were realized. * * * The major reason was that the Court was slow to utilize the sophistical possibilities of the 'due process' clause of the 14th Amendment in determining whether a person was restrained of his liberty in violation of the constitution." Collings, *Habeas Corpus for Convicts–Constitutional Right or Legislative Grace*?, 40 Cal. L. Rev. 335, 352 (1952).

However, even before this Court began to recognize the reach of the due process clause of the 14th Amendment, it treated the habeas corpus jurisdiction as broader than the jurisdiction at common law. *Ex parte Lange*, 18 Wall. 163 (1873); *Ex parte Seibold*, 100 U.S. 371 (1879); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Hans Nielson, Petitioner*, 131 U.S. 176 (1889).

These early cases were the beginning of "a long process of the expansion of the concept of a lack of 'jurisdiction'." Hart, *"Forward; the Time Chart of the Justices"*, 73 Harv. L. Rev. 84, 104 (1959). This sporadic process of expansion became a linear evolution from *Moore v. Dempsey*, 261, U.S. 86 (1923), to *Johnson v. Zerbst*, 304 U.S. 458 (1938), through which the Court expanded the concept of a jurisdictional defect in tandem with the expansive recognition of constitutional rights of the accused, so that the denial of such rights became a jurisdictional defect. Thereafter, in *Waley v. Johnson*, 360 U.S. 101 (1942), the Court turned directly to the language granting jurisdiction, and held that the jurisdiction "extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his right." 360 U.S. 104-105. Finally in *Brown v. Allen*, 344 U.S. 443 (1953), the Court decided that:

> "* * * Due process of law in the case of state prisoners is not primarily concerned with the adequacy of the state's corrective process, or the prisoner's personal opportunity to avail himself of this process—with the proper operation, in other words, of the rules distributing authority to make decisions—but relates essentially to the avoidance in the end of any underlying constitutional error—that is, to the correct application of basic Federal rules governing the decision to be made. * * *" *Hart*, op. cit., 73 Harv. L. Rev. 106; cf. *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1045-1062 (1970), where the evolution of Habeas Corpus is also traced.

The habeas corpus jurisdiction over prisoners has expanded as the application of the Constitution to state criminal trials has expanded. The process of evolution has been an all but inevitable outcome of the original decision of Congress to let the habeas corpus jurisdiction follow the constitution. Thus in *Linkletter v. Walker*, 381 U.S. 618 (1965) and *Warden v. Hayden*, 387 U.S. 294 (1967), when this Court recognized that *Mapp* brought exclusionary rule cases within the habeas corpus jurisdiction, the Court merely continued the process of integrating the habeas jurisdiction into the ambit of constitutional rights.

2. The modern scope of federal habeas corpus, which includes within its zone state search and seizure cases, is fully consistent with the historic understanding of the writ at the time the constitution was adopted.

In *Fay v. Noia*, supra, this court read the Act of 1867 as intended "to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the Federal Courts to their constitutional maximum." 372 U.S. 426. As we have already demonstrated, that reading is fully consistent with the legislative history of the Act of 1867. However, the court buttressed this reading by noting that "at the time the privilege of the writ was written

into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law * * *" The concurring opinion by Mr. Justice Powell in *Schneckloth* concedes that if this reading is correct, "the present wide scope accorded the writ would have arguable support, despite the impressive reasons to the contrary." 412 U.S. 253. However, that opinion goes on to argue that "Fay's version of the writ's historic function" is distorted. For this conclusion, principal reliance is placed upon Oaks, *Legal History In The High Court–Habeas Corpus,* 64 Mich. L. Rev. 451 (1966). However, a close reading of Oaks' research demonstrates that it in fact supports the conclusion reached in *Fay.*

Oaks' article deals primarily with English practice in the 17th Century. His argument is that English practice could not be the forerunner of modern federal habeas, because the writ would not run in favor of one convicted by a court of common law. If the common law court had jurisdiction that was the end of inquiry on habeas corpus. However, modern federal habeas penetrates the jurisdiction of a state court to examine the constitutional adequacy of its process. Thus, Oaks' argument runs, the common law practice could not be precedent for what is done today.

Oaks notes that the scope of habeas was considerably broader where inferior courts were involved, 64 Mich. L. Rev. 456-457; 459-460. A similar divergence in practice, where inferior courts were concerned, apparently existed in some states before the Civil War. Oaks, *Habeas Corpus in the States–1776-1865* 32 U. Chi. L. Rev. 243, 259-260 (1965). Thus, the historic limitations on the writ where courts of coordinate jurisdiction were involved are only relevant on the assumption that the

federal habeas court and the state courts are courts of coordinate jurisdiction. But as Oaks, himself, has noted:

> "If the rule limiting habeas corpus review to so-called jurisdictional defects did not apply to writs issued by a court with supervisory authority over the committing court, the exception could easily engulf the rule in the important area of federal review of state commitments. On issues of federal law, federal courts have 'supervisory authority' over state courts, which they can appropriately exercise by means of their statutory authority to issue the writ of habeas corpus for state prisoners." Oaks, op. cit. *Habeas Corpus in the States,* 32 U. Chi. L. Rev. 288 fn 242.

In the struggle between this court and the Virginia Court of Appeals during the Chief Justiceship of John Marshall, the Virginia Court resisted the appellate jurisdiction of this court upon the grounds that both the Virginia Court of Appeals and this Court were courts of coordinate jurisdiction; each was the highest court within a separate but equal legal system. However, in *Martin v. Hunter's Lessee,* 1 Wheat. 304 (1816) and *Cohens v. Virginia,* 6 Wheat, 264 (1821), this court determined that the Supremacy Clause gave to it a superior position on questions of Federal Law. As Bator notes:

> "... In a unitary jurisdiction appellate review provides authoritative and uniform pronouncements on the law of that jurisdiction; similarly, recourse in our federal systems to the Federal Supreme Court provides the state law with authoritative and uniform pronouncements of federal law. (It is for this reason that I do not view direct Supreme Court review of State cases as in any sense 'collateral.') Appeal, then serves that aspect of justice which tells us that the same law

> ought to apply to different people similarly circumstanced, and, curiously, in this sense does not subvert repose, but creates it. . ." Bator, op cit, *Finality in Criminal Law,* 76 Harv. L. Rev. 453-454.

But the same comment may logically be made with regard to the habeas jurisdiction of the District Courts. As Justice Frankfurter noted in *Brown v. Allen,* supra, 344 U.S. 510:

> "Insofar as this jurisdiction enables Federal District Courts to entertain claims that the State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect respecting the supremacy clause of the Constitution whereby federal law is higher than State Law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this court, does not mean that it allows a lower court to overrule a higher court. It merely expresses that the choice of Congress how the superior authority of federal law should be asserted."

Once it is recognized that the habeas corpus jurisdiction "merely expresses the choice of Congress how the superior authority of federal law should be asserted", then the analogy to the practice that obtained among courts of coordinate jurisdiction collapses. The appropriate analogy becomes the use of habeas corpus in cases where decisions of inferior courts were involved. If that is the proper analogy, then the claim of historic distortion evaporates.

Oaks' article *"Legal History in the High Court–Habeas Corpus"* is in large measure a critique of the statement in *Fay v. Noia,* 372 U.S. 391, 406 (1963), that, "at the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to the fundamental law, which in England stemmed ultimately from Magna Carta, but in this country was embodied in the written Constitution." And the statement that the historic function of the writ was "to provide a prompt and effecacious remedy for whatever society deems to be intolerable restraints * * * vindication of due process is precisely its historic office." 372 U.S. 401-402. The great difficulty, however, is that *Fay* and Oaks are talking at cross purposes. If the question is what particular abuses did habeas corpus reach, then as Oaks has elsewhere noted:

> "* * * At common law and under the famous Habeas Corpus Act of 1679, the use of the great writ against official restraints was simply to insure that a person was not held without formal charges and once charged he was either bailed or brought to trial within a specific time period. If a prisoner was held by a valid warrant or pursuant to the execution or judgment of a proper court, he could not obtain release by habeas corpus * * *" Oaks, op. cit, *Habeas Corpus in the States,* 32 Univ. of Chic. L. Rev. 244-245.

However, if the question is, why did habeas corpus have that particular reach, then *Fay* has the better of the debate. As Oaks demonstrates, habeas corpus was used in the 17th Century to assure that imprisonments arose only in the ordinary course of the common law. Oaks, op cit, *Legal History in the High Court,* 64 Mich. L. Rev. 459-460, 464-466. The constitutional struggle of

that period was a struggle to assure the "due process of law" promised by Magna Carta. In the context of the times, due process was regarded as equivalent to the ordinary process of the common law. Kier, *The Constitutional History of Modern Britain* (8th ed), pp. 160, 198, 214. "Intolerable restraints" were those imposed outside those processes, and all such restraints were reached by the writ.

Fay and Oaks are not at issue on what history says. They are at issue as to why we examine history. This problem arises whenever any question of extending an historically rooted legal doctrine arises. Do we examine the history of the doctrine to find out what particular kinds of cases it reached, and then limit the doctrine only to those cases? Or do we examine history to find out the why of the rule? To determine the reason why the particular type of cases were reached by the doctrine, and they apply it to all cases within the underlying rationale of the doctrine, rather than merely to the historic incidents? At least with regard to the language of the Constitution, the broader functional analysis has always been utilized. That is what has given the Constitution its capacity to endure.

In the English understanding, "process of law is an introduction to those in power not to use coercion except with legal authority." Lucas, *The Principles of Politics*, p. 84. Under such a regime, habeas corpus functions to assure that all detentions are in accordance with the ordinary processes of law, whatever they may be. Lucas, op. cit., pp. 86-88; Dicey, *The Law of The Constitution* (10th ed.) pp. 217-219. The Constitution alters our concept of due process. The ordinary course of law is made subject to certain overriding limitations on power entrenched in the Constitution. In 1867,

when Congress provided that habeas corpus would reach all restraints in violation of the Constitution, it returned habeas corpus to "its historic office", the "vindication of due process." *Fay v. Noia*, supra, 372 U.S. 401-402. However, this "historic office" was to be performed in the American context in which due process is particularized by the specific provisions of the Bill of Rights. When the Fourteenth Amendment brought state criminal process within the ambit of the Constitution, the 1867 Act brought state convictions within the ambit of habeas corpus to assure compliance with the Constitutional notion of due process.

3. The policies which underpin the extension of federal habeas corpus jurisdiction to state prisoners fully support the application of that jurisdiction to cases in which the petitioner claims that his conviction was procured because of a misapplication of fourth amendment learning.

The existence of any federal question jurisdiction in district court is evidence of a congressional doubt that appropriate resolution of the federal issue may be expected from the state court. See Mishkin, *The Federal 'Question' in the District Courts*, 53 Colum. L. Rev. 157 (1953).

> "* * * Since the inception of the government, (federal trial) courts have been employed in cases 'in which the state tribunal cannot be supposed to be impartial and unbiased,' for as Hamilton wrote in *The Federalist*, 'The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes.' The federal question jurisdiction of the federal district courts

in civil cases rest largely on the assumption that federal judges 'are more likely to give full scope to any given Supreme Court decision and particularly one unpopular locally, than are their state counterparts.' * * * Particularly, in civil cases involving civil rights, 'Congress has declared the historic judgment that within this precious area, often calling for a trial by jury, there is to be no slightest risk of nullification by state process.' * * *" Amsterdam, op. cit., 113 U. of Penn. L. Rev., 802-803.

This same suspicion of the local forum, underpins the habeas corpus jurisdiction over state prisoners.

"* * * To a state trial judge, the goals of the federal Constitution in protecting individual rights from unlawful government action, may appear less important than a conviction in a given case. The federal habeas court, however, is lodged in a different institutional setting, with different loyalties and assumptions which may foster greater hospitality to constitutional goals. In some sense, the federal judge's primary allegiance is to the Supreme Court's interpretation of the Constitution, while on a practical level, the state judge's allegiance to the constitution may be weakened by his proximity to the State's enforcement of its criminal law. The federal forum, therefore, may be preferable for the separate proceeding which tests the constitutional basis of the conviction, not the prisoner's guilt or innocence. * * *

"The modern habeas corpus jurisdiction, then, is best understood as an institutional device for the supervision of state enforcement of federal rights, based on the dual premises of the need for separate proceedings to ensure that individual rights are protected, and the need for a federal court to decide constitutional claims to ensure that federal rights are fully vindicated. Thus, federal collateral redetermination of constitutional claims

previously reviewed by state courts is an appropriate method of guaranteeing that the proper constitutional standard was used by the state court and that the standard was properly applied to the facts." *Developments–Federal Habeas Corpus,* op. cit., 83 Harv. L. Rev. 1060-1062.

The modern habeas corpus jurisdiction rests "on the principle that a state prisoner ought to have an opportunity for a hearing on a federal constitutional claim in a federal constitutional court, * * *" Hart, op. cit., 73 Harv. L. Rev. 106. Since this Court cannot in most cases grant that review, the task must necessarily be performed by a district court exercising the habeas jurisdiction. Reitz, *Federal Habeas Corpus; Post-Conviction Remedy for State Prisoners,* 108 U. Penn. L. Rev. 461, 474 (1960); Amsterdam, *Search, Seizure, and Section 2255; A Comment,* 112 U. Penn. L. Rev. 378, 380 (1964); Mishkin, *Forward; The High Court, the Great Writ, and the Due Process of Time and Law,* 79 Harv. L. Rev. 86-87 (1965); *Developments–Federal Habeas Corpus,* op. cit., 83 Harv. L. Rev. 1061.

"* * * Providing a federal forum creates a greater likelihood of uniform application of federal constitutional law to all state prisoners. Not only is the possibility of local disregard of federally protected interests lessened, but also, the appellate supervision of the federal district courts by the eleven federal courts of appeals provides a cohesive influence on the federal judicial system not present when fifty independent state judicial systems interpret constitutional law. The Supreme Court's review of state decisions cannot systematically induce this sort of uniformity, for the practical burden is too great. * * *" *Developments–Federal Habeas Corpus,* op. cit., 83 Harv. L. Rev. 1061.

All of the commentary noting the necessity for federal habeas because of the practical impossibility of review in this court were composed before the work load of this Court reached the proportions that have now justified the proposal for the National Court of Appeals. See, Bright, *The Changing Nature of the Federal Appeals Process in the 1970's,* 65 FRD 496, 497-498 (a brief recent review of the various proposals). Given the necessity of shifting part of this Court's work load to another court, the argument from necessity for the federal habeas jurisdiction becomes greater.

These basic premises of the federal habeas jurisdiction have been debated. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 507-521 (1963). This, it is argued that the rationale for the habeas jurisdiction gives inadequate respect to the role of the state courts in the development and application of federal law, Bator, op. cit., 76 Harv. L. Rev. 510-511. But as Amsterdam has noted:

> "The argument which asserts the value of maintaining a partnership of state courts in the administration of federal rights, is, I think, the most persuasive and least easily rebutted objection to federal judicial action anticipating state process. Nevertheless, enthusiasm for the partnership as an ideal ought not to obscure recognition that it is an ideal which state judges will never more than imperfectly than elsewhere in cases where fourteenth amendment protection is invoked to insulate unpopular activity from the power of the States to restrain. Stated as an unqualified preference for state administration on federal law which takes its shape within a matrix of state law

> regulation, the argument evidently proves too much; for every Congressionally created federal trial court jurisdiction constitutes to some extent a subordination of that value to the values of federal law enforcement by nationally responsible tribunals. And, if it is true that constitutional restrictions on the state criminal process present a particularly fertile field for valuable interaction of federal and state law in the state courts, it is also true that they present a particularly strong adversity of state and federal interests, and hence a particularly strong risk that federal rights will suffer if left in state hands." Amsterdam, op. cit., *Removal and Habeas Corpus,* 113 U. of Penn. L. Rev. 836

Similarly, it has been argued that modern federal habeas gives an inadequate deference to the state's interest in finality, Bator, op. cit., 76 Harv. L. Rev. 444-453. On the other hand, the rebuttal is made that:

> "In the case of federal habeas for state prisoners, the total impact of the finality considerations as they operate uniquely upon each habeas corpus case is a part of the gross price which the federal system pays under *Brown v. Allen* to give the prisoner his federal judge. The price is high, no doubt, but the stakes are also high, for the prisoner, and the alternatives–leaving federal 'facts' together with much of federal law' to the state trier; * * *" Amsterdam, op cit., *Search. Seizure and Section 2255,* 112 U. of Penn. L. Rev. 384-385, fn. 33.

Likewise, the argument is made that the current scope of the federal habeas jurisdiction is a distortion of the history of the writ and of the Act of 1867, Bator, op. cit., 76 Harv. L. Rev. 463-499; Mayer, *The Habeas Corpus Act of 1867; The Supreme Court as the Legal Historian,* 33 U. of Chi. L. Rev. 31 (1965);

Others familiar with the history disagree. Thus, in an exhaustive study of the history of the Habeas Corpus Act of 1867, Amsterdam notes,:

> "In my view, Bator neglects the overriding purpose of the Act of February 5, 1867, * * * to give all state prisoners both a federal trial forum and access to the Supreme Court for litigation of their federal claims, whatever those claims might be." Amsterdam, op. cit., *Removal and Habeas Corpus,* 113 U. of Penn. L. Rev. 839, n. 191.

However, none of these arguments for limiting habeas corpus jurisdiction, whatever their merits, are applicable solely to suppression cases. If the arguments have validity, they have them in all federal habeas cases. If habeas should not lie where the state has granted a petitioner a fair opportunity to litigate an issue, that is because habeas is too expansive, and not because search and seizure cases are peculiarly unsuitable for habeas resolution.

All of the arguments for limiting habeas jurisdiction were pressed on Congress in 1956, when a bill to limit habeas to cases where the State had not granted the defendant an adequate opportunity to litigate the issue was under consideration. That legislation failed passage. See Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners; Collateral Attack on the Great Writ,* 66 Yale L.J. 50, 51, 57 (1956). Such legislation was again considered by Congress in 1958 and in 1959, but on neither occasion did the legislation become law. Reitz, op. cit., *Federal Habeas Corpus,* 108 U. of Penn. L.Rev. 523, fn. 342. By 1959, efforts to adopt the adequate opportunity limitation were abandoned. Reitz, op. cit., 108 U. of Penn. L.Rev. 523. Finally, in 1966, with full knowledge of the gloss which this Court had placed on the Habeas Act in *Brown v. Allen,* supra,

Congress enacted §§2254, which continued the jurisdictional grant of the 1867 Act. Under standard canons of construction, *Georgia v. United States,* 411 U.S. 526,533 (1973); *Blue Chip Stamps v. Manor Drug Stores,* 43 L.Wk. 4707, 4710 (1975), when Congress reenacted the jurisdictional grant of the 1867 Act, it thus approved the gloss which this Court had placed upon it.

If some limitation, such as the fair opportunity limitation, is to be adopted in habeas cases involving search and seizures, the justification for the limitation must be found in peculiarities of search and seizure cases. The only suggested rationale for such a limitation is that the suppression remedy does not go to guilt or innocence. However, this is not a peculiarity of search and seizure cases alone. Extorted confessions are inadmissable even though there is independent evidence of their trustworthiness. *Rochin v. California,* 342 U.S. 165,173 (1952). See Traynor, *The Devils of Due Process in Criminal Detection, Detention and Trial,* 33 U. of Chi. L.Rev. 657, 665-666 (1966); Schwartz, *Retroactivity, Reliability and Due Process, Reply to Professor Mishkin,* 33 U. of Chi. L.Rev. 719, 725-726 (1966). The admission of a compelled, but reliable confession can be raised on federal habeas corpus. *Rogers v. Richmond,* 365 U.S. 534, 543-545; Bender, op. cit., 110 U. of Penn. L.Rev. 656.

Moreover, this factor of irrelevance to guilt or innocence, has not generally been thought to distinguish habeas cases involving search and seizures from other habeas cases. Thus, Amsterdam argues:

"One must distinguish at the outset the problem of federal habeas corpus for state prisoners * * * there are substantial justifications for federal district court litigation or relitigation of federal contentions invoked in bar of a state criminal conviction. Volume of cases and inadequate state procedures make reliance on the Supreme Court unsatisfactory here; the Court is not properly a routine enforcement agency; in any event with perhaps greater reason than support the district court's federal question, civil rights, and specific removal jurisdictions–not to speak of diversity jurisdiction–it makes good sense to give a state criminal defendant a federal judge to try the facts underlying his federal constitutional claim. Absent an applicable removal provision, *Brown v. Allen* thus construed the federal habeas corpus jurisdiction, * * *" Amsterdam, op. cit., *Search, Seizure, and Section* 2255, 112 U. of Penn. 1.Rev. 379-380; Bender, op. cit., 110 U. of Penn. L.Rev. 655-657.

Mishkin has gone further, and argues that the very fact that suppression cases do not go to guilt or innocence makes them even more appropriate for federal habeas resolution, than cases involving those due process guarantees which seek to guarantee the reliability of the conviction process.

"The functions of habeas corpus change significantly when the relevant constitutional requirements are not those seeking to assure the reliability of the conviction process, but rather those seeking to advance other objectives, such as respect for human dignity and integrity. It is not that constitutional guarantees of this latter kind are any less important; the contrary may well be true. Indeed, it is precisely the importance of these guarantees which justifies the granting of federal habeas corpus for their violation. For if full

compliance with the requirements of these guarantees is to be exacted, adequate means for their enforcement must be provided. Such effective enforcement of federal guarantees directed as state criminal procedure can only be through the availability of federal habeas corpus. Reliance upon direct review by the Supreme Court as the exclusive enforcement would be illusory. The sheer volume of the Court's work, not to mention inadequacy of some state procedures for presenting these questions, would preclude adequate vindication of these constitutional rights. This is true enough as to cases that raise only issues of law. It is even more significant with regard to those that present questions of fact on which federal rights may depend; even where records are adequate–let alone the many criminal cases where they are not–effective enforcement of such constitutional guarantees will only be possible through use of the federal habeas corpus channel." Mishkin, op. cit., *The Supreme Court–Forward,* 79 Harv. L.Rev. 86-87.

Independent of the arguments for maintaining the habeas corpus jurisdiction over search and seizure cases, in 1966, when Congress reenacted the jurisdictional grant in §§2254, such cases clearly came within the jurisdiction with regard to state prisoners. *Mapp* had been decided in 1961. Mapp held that the admission of unlawfully seized evidence in a state trial was error of constitutional dimension, violative of the mandate of the fourth amendment "that no man is to be convicted on unconstitutional evidence." 367 U.S. 657. This mandate of the fourth amendment was to be "enforceable in the same manner and in like effect as other basic rights secured by the due process clause * * *" 367 U.S. 660. Read with *Brown v. Allen, Mapp* brought search and seizure cases within the

habeas jurisdiction, where state prisoners were involved. The courts of appeals, as we have noted, appear immediately to have drawn this implication. For example, the Eighth Circuit which had consistently held with regard to 28 U.S.C. 2255, that claims of unlawful search and seizure "are not proper matters to be presented by a motion to vacate sentence * * * but can only be properly presented by appeal from the conviction." *Warren v. United States,* 311 F.2d 673, 675 (8th Cir. 1963) entertained state prisoner habeas corpus cases involving claims of unlawful search and seizure without indication of doubt of jurisdiction, see, e.g., *Burnside v. Nebraska,* 346 F.2d 88 (8th Cir. 1965). Finally, in 1965, this Court indicated in *Henry v. Mississippi,* supra, and then held by implication in *Linkletter v. Walker* that state search and seizure cases came within the habeas jurisdiction. "The long-standing acceptance by the Courts" of this jurisdiction, "coupled with Congress' failure to reject" this "reasonable interpretation of the wording" of §§2254, "argues significantly in favor" of continuation of the habeas jurisdiction over search and seizure cases. *Blue Chip Stamps v. Manor Drug Stores,* supra, 43 Law Week 4710. Unless §§2254 is modified by the Congress, "the judiciary may not circumscribe a right which Congress had conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability" *Blue Chip Stamps v. Manor Drug Stores,* supra, 43 Law Week 4715.

We have already noted that modification of habeas corpus jurisdiction is a matter for the Congress. Congress is not unaware of the arguments made for modification in the concurring opinion in *Schneckloth v. Bustamonte.* Legislation which tracks the position of

that opinion was introduced as S. 567 and HR. 3329, 93rd Cong., 1st Sess. See, *Comment, Proposed Modification of Federal Habeas Corpus for State Prisoners-Reformer Revocation,* 61 Geo. L.J. 1221 (1973). With the passage of such legislation the principles of the concurring opinion in *Schneckloth* would be embodied in the law. If it is not passed, then those principles will have been rejected by the Congress. In either event, the place of decision will be the appropriate one; legislating will be done by legislators.

The authority of Congress to determine what part of the Article III jurisdiction to grant to the inferior federal court is beyond question. With particular regard to vindication of fourteenth amendment rights, Congress is granted independent legislative authority by section five of the Amendment. *Katzenbach v. Morgan,* 384 U.S. 641; 649-651, cf. (1966); *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). The factors to be weighed in determining how these powers should be exercised are not in dispute. The countervailing factors were weighed one way by this Court in *Brown v. Allen, Fay v. Noia,* and *Linkletter v. Walker*, and another way by the concurring opinion in *Schneckloth.* Still others, have weighed the factors differently and suggested other procedures as the best accommodation of the competing values. Some find the answer in a broadened federal appellate remedy in an intermediate federal appellate court, either with or without modification of habeas. Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System,* 59 Corn. L. Rev. 597 (1974); Haynsworth, *A New Court to Improve the Administration of Justice,* 59 A.B.A.J. 841 (1973) Hufstedler, *Comity in the Constitution,* 37 N.Y.U. L. Rev. 841, 852-853 (1972); Friendly, *Is Innocence*

Irrelevant?, Collateral Attack on Criminal Judgments, 38 U. of Chi. L. Rev. 142, 166 (1970). Others have argued that procedural reform in habeas can accomplish solution, Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved,* 21 DePaul L. Rev. 701 (1972); Weick, *Apportionment of Judicial Resources in Criminal Cases: Should Habeas Corpus be Eliminated?,* 21 DePaul L. Rev. 740 (1972). However, in *Brown v. Allen,* this Court struck the balance. If that balance is now to be modified because of a new weighing of the arguments, it is for Congress "to assess and weigh the various conflicting considerations," *Katzenbach v. Morgan,* supra, 384 U.S. 653, and strike the new balance.

B. The Removal of Search and Seizure Questions From the Scope of Federal Habeas Corpus Would Substantially Diminish the Deterrent Effect of the Exclusionary Rule.

The concurring opinion in *Schneckloth v. Bustamonte,* supra, notes that, "the case for the exclusionary rule varies with the setting in which it is imposed." 412 U.S. 271. One of the important factors to weigh in any particular setting is the deterrent effect of the rule in that context. 412 U.S. 271. We believe that a proper weighing of the deterrent effect of federal habeas corpus strongly argues that removal of search and seizure cases from federal habeas would substantially blunt the deterrent effect of the exclusionary rule.

The argument is frequently made that the exclusionary rule fails to deter. For this proposition the universal reference is Oaks, *Studying the Exclusionary*

Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1975). However, as Professor Amsterdam has noted:

> "Professor Oaks' comprehensive survey indicates to me nothing more than that the evidence so far gathered is a stand off, and that the hopes of gathering better evidence in the future are very slim. . . . The fact that a considerable amount of illegal search and seizure activity persists despite the exclusionary sanction, . . ., certainly does not demonstrate its inefficacy as a control. A lot of people go out in the rain, even though the rain prevents many others from going out. . . ." Amsterdam, *Perspectives on the 4th Amendment,* 58 Minn. L. Rev. 349, 475 fn. 593 (1974).

Moreover, the primary weakness which Professor Oaks sees in the exclusionary rule is that it does not deter in cases where prosecution is not contemplated. Oaks, op cit. 37 U. Chi. L. Rev. 720-724. Oaks does not argue that the rule does not have a deterrent impact in cases where trial is expected. Where prosecution is likely to follow, Oaks concedes probable deterrent.

> "The point of this section is not that the exclusionary rule can have no direct deterrent effect. There are probably situations where it deters. In crimes such as homicide, where prosecution is almost a certainty and where public interest and awareness are high, the conditions for deterrence are optimal and the exclusionary rule is likely to effect police behavior . . ." 37 U. Chi. L. Rev. 731-732; Cf. Skolnick, *Justice Without Trial* (2d Ed.) pp. 224-225.

The cases that come to federal court raising search and seizure issues have generally been tried in full. Cases where search and seizure issues were resolved adversely to the petitioner and a guilty plea foilowed are barred in the absence of a showing of inadequacy of

counsel, see, *McMann v. Richardson,* 397 U.S. 759 (1970); *Tollett v. Henderson,* 411 U.S. 258 (1973). Thus, the usual federal habeas case falls into the class where the exclusionary rule has its maximum deterrent effect, the class of cases where trial can be foreseen.

One justification for the federal habeas corpus jurisdiction is that "on a practical level the state judge's allegiance to the Constitution may be weakened by his proximity to the state's enforcement of its criminal law." *Developments in the Law–Federal Habeas Corpus,* 83 Harv. L. Rev. 1038, 1061 (1970); Cf. Amsterdam, *Criminal Prosecution Effecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,* 113 Univ. of Pa. L. Rev. 793, 802-803 (1965). This "proximity to the state's enforcement of its criminal law" would have its greatest impact on a judge in cases where the constitutional provision involved was irrelevant to guilt or innocence. Mishkin, *Forward: The Great Writ, and the Due Process of Time and Law,* 79 Harv. L. Rev. 56, 86-87 (1965). Search and seizure cases are a paradigm of constitutional litigation in which guilt or innocence is not involved. They are the cases in which it is most likely that federal rules will be ignored in service of the interest of law enforcement. Amsterdam, op cit, *Fourth Amendment,* 58 Minn. L. Rev. 471-472 fn. 532.

If the federal habeas corpus jurisdiction was removed, the police would foresee resolution of search and seizure issues primarily by state trial judges likely to be more sympathetic to the policeman than to the Fourth Amendment. Since the efficacy of a sanction turns in large measure on the perception of the risks of detection and adjudication of fault, Oaks, op cit.

Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 724-725; Posner, *Economic Analysis of Law,* p. 33, this anticipation of a friendly forum would enervate the deterrent effect of the rule in cases where it now has an impact. On the other hand, the threat of having conduct reviewed before a federal judge, whose "primary allegiance is to the Supreme Court's interpretation of the Constitution," serves as a substantial deterrent, even where the police can foresee being heard in the first instance by a sympathetic state judiciary. *Developments–Federal Habeas Corpus,* 83 Harv. L. Rev. 1061.

Modification of the habeas corpus jurisdiction would impact the exclusionary rule in the very cases where it can be expected to perform its deterrent function. However, the argument is made that:

> "... on collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves. For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap of state police by Federal Court harms no one but society on whom the convicted criminal is newly released." *Schneckloth v. Bustamonte,* supra, 412 U.S. 269 (Concurring opinion of Mr. Justice Powell).

The exclusionary rule does not aim at special deterrence. As Oaks explains:

> "Special deterrence ... is the effect of a sanction on an individual who has already experienced it. It measures the likelihood of his repeating particular behavior once he has been singled out to

> taste its consequences. The exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement officer who has broken the rule . . ." Oaks, op cit, *Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 709-710.

Rather the exclusionary rule aims at general deterrence. That is, it seeks to modify conduct by reenforcing the social norm embodied in the Fourth Amendment and by threatening sanction to those who disobey it. Oaks, op cit. 37 U. Chi. L. Rev. 710-711; Posner, *Economic Analysis of Law,* p. 7. From the point of view of general deterrence, it is not clear what, if any, relevance the delay in announcing the application the sanction has. So long as the police hear about what happened, the sanction will have its effect.

There is an additional difficulty in any attempt to argue that the removal of search and seizure cases from federal habeas corpus is a minor modification of the exclusionary rule and that, therefore, such a modification would have only a minor impact on the deterrent value of the rule. As Oaks notes:

> ". . . Direct deterrence is also dependent upon how gravely law enforcement officers view the consequences of excluding evidence, and upon how they compare those consequences with the competing alternatives. In other words, the direct deterrent effect of the exclusionary rule will depend upon the individual's perception of the relative costs of conformity or non-conformity with the rule . . . because the exclusionary rule operates upon conduct that is generally quite deliberate and frequently even the result of formal or informal law enforcement policies, it is likely to involve a calculation of alternatives at some point . . ." Oaks, op cit, 37 U. Chi. L. Rev. 710-711.

A modification of the exclusionary rule, such as removal of exclusionary cases from habeas, reduces the cost of noncompliance. While the diminution in cost may appear small, there is no reason to assume *a priori* that the corresponding change in conduct will be small. The magnitude of the effect would depend on the responsiveness of police conduct to the change in the cost of noncompliance. See Posner, *Economic Analysis of Law,* 117, 224-225, and that elasticity is an unknown.

In his concurring opinion in *Schneckloth v. Bustamonte,* supra, 412 U.S. 269-270, Mr. Justice Powell noted that:

> "* * * The non-frivolous fourth amendment claims that survive for collateral attack are most likely to be in this grey, twilight area, where the law is difficult for courts to apply, let alone for the policeman on the beat to understand. This is precisely the type of case where the deterrent function of the exclusionary rule is least efficacious, and where there is the least justification for freeing a duly convicted defendant."

The remedy proposed by the concurring opinion in *Schneckloth* is to return in Fourth Amendment cases to the rule in *Frank v. Mangum,* 237 U.S. 309 (1915), and limit "the inquiry of the federal court on habeas review of a state prisoner's fourth amendment claim * * * to the question whether the defendant was provided a fair opportunity in the state court to raise and have adjudicated the Fourth Amendment claim." 412 U.S. 266.

The remedy proposed in *Schneckloth* is broader than the evil at which it is aimed. This case demonstrates that point. This case is precisely the type of case where exclusion is likely to have a deterrent effect, a case

where the police can foresee trial. Oaks, op. cit., *Exclusionary Rule in Search and Seizure*, 37 U. of Chi. L. Rev. 731-732. The legal principles applied in this case are not in the grey area. The district court and the court of appeals found a want of probable cause. Presumably, every police officer knows of the requirement of probable cause, *Lankford v. Gelston*, supra. The standards of probable cause applied "are practical and not abstract." *United States v. Vantresca*, supra, 380 U.S. 108. They are the nontechnical standards of common sense and realism, that is, the standards of a reasonable layman. *United States v. Ventresca*, supra. Therefore, they are not standards requiring legal sophistication beyond the policeman's ken. The officers in this case were not "the policeman on the beat," *Schneckloth v. Bustamonte*, supra, 412 U.S. 269, rather both Pfeffer and Swanson were command detectives, who could be expected to be familiar with and influenced by the exclusionary rule. Oaks, op. cit., *Exclusionary Rule in Search and Seizure*, 37 U. of Chi. L. Rev. 711. Yet, under the fair opportunity doctrine, this case would be excluded from federal habeas in order to exclude cases in which it bears no analogy.

If the problem is with cases "in this grey, twilight area," then the appropriate focus is upon those cases, rather than all search and seizure cases. For example, grey area cases would be eliminated, if the federal habeas court could defer to the state's decision on law questions, as it now defers to its decisions on fact questions, *Townsend v. Sain*, 372 U.S. 293, 316 (1963), unless the federal habeas judge is "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Alternatively, if this Court

adopts the good faith standard for suppression for which Nebraska opts, grey area cases would disappear, since the confused state of the law would prevent a finding of bad faith on the part of the police officers, see *Wood v. Strickland*, supra. But whatever the remedy, if the grey area is the problem, then the solution should be tailored to that problem.

Nebraska argues, brief of petitioner, at 50, that "the present case is a classic example of the reason why search and seizure questions should not properly be cognizable in federal habeas corpus." For this proposition, a most eccentric argument is made. Firstly, the state argues with regard to Rice's brief in the Nebraska Supreme Court that "nowhere in said brief is there any hint that Rice was innocent or that any interest of society were to be served by reversing the conviction or excluding evidence." The Nebraska Supreme Court is an appellate court. Its function is not to determine guilt or innocence. If there is a sufficient case for jury, the fact that the jury convicts someone the Nebraska Supreme Court thinks is innocent is irrelevant. See, *State v. Nydegger*, 186 Neb. 61, 187 N.W.2d 892, 896 (1970). Thus, since the appeal was not bottomed on sufficiency of the evidence, the issue of innocence was irrelevant. The Nebraska Supreme Court was bound by the decisions of this Court in search and seizure cases. Those cases did not require that a claim of innocence be made or that a showing be made that "interests of society were to be served by reversing." *Simmons v. United States*, 390 U.S. 377, 389-394 (1968). Since such claims were not required, they would have been pointless. The same point may be made with regard to the absence of these claims in the petition for habeas corpus. See, *Kaufman v. United States*, 394 U.S. 217,

242 (1969) (Mr. Justice Harland, dissenting); *Schneckloth v. Bustamonte*, 412 U.S. 218, 257-258 (1973) (Mr. Justice Powell, concurring).

David Rice has always maintained his innocence. He is not a lawyer. He did not draft the brief to the Nebraska Supreme Court. He did not draft the petition for a writ of habeas corpus. Those documents were prepared by lawyers on his behalf. Claims of innocence and claims of societal advantage were not made because they were not required by existing case laws. If the absence of those claims is now to be treated as significant, then litigation becomes less than a game. If a client suffers because his attorney takes the decisions of this Court seriously, then the law was ceased to be a profession for honorable men.[4]

---

[4]On his appeal to the Nebraska Supreme Court, David Rice was not satisfied with the brief filed by his counsel because it did not address the issue of guilt or innocence. Therefore, Rice, in conjunction with his co-defendant, Poindexter, filed a supplemental brief which attacked the finding of guilt. He raised the insufficiency of the evidence against him and attacked the admissibility of Duane Peak's testimony because of contradictions therein. In addition, he contended that Peak's testimony at trial was perjured and had come as a result of threats from the police, a deal with the office of the county attorney, and overreaching by one of the deputy county attorneys. The Supreme Court briefly addressed the issues raised in this supplemental brief.

When the petition for federal habeas was filed, Rice again filed a supplemental petition raising the issues contained in the supplemental Nebraska Supreme Court brief. The district court refused to consider this petition because it had not been filed by counsel of record.

At every stage of the appellate and post-conviction process David Rice has chafed at the advice of counsel that guilt or

If colorable claim of innocence be required, then we make it on Mr. Rice's behalf now. We note that the evidence which the state claims was found in Rice's home did not prove him guilty of the crime of which he was convicted, first degree murder. The only evidence which directly connected Rice with the murder came from Duane Peak. Since Peak confessed the murder, his testimony under Nebraska law was suspect and subject to the closest scrutiny. *Callies v. State*, 157 Neb. 640, 61 N.W.2d 370, 377 (1953); cf. *Losieau v. Sigler*, 421 F.2d 825 (8th Cir. 1966). His testimony was given under circumstances smacking of a deal. Subsequent to Rice's trial Peak was handled as a juvenile delinquent rather than an adult felon, not the usual Nebraska practice in first degree murder cases. *Fugate v. Ronin*, 167 Neb. 70, 91 N.W.2d 240 (1958); *State v. Grayer*, 191 Neb. 523, 215 N.W.2d 859 (1970). The evidence allegedly found in Rice's home was used to corroborate Peak's testimony. It takes no deep

---

innocence was not the central issue. He had done everything which he personally could, to secure federal court review of the sufficiency of the evidence. Throughout the case, he has sought a judicial finding that only Peak was involved in the killing, and that his own prosecution was politically motivated and designed to remove him from the community because of hostility to his political views. He has sought to point out that the principal witness against him, Duane Peak, was frightened of the death penalty, and that that fear was manipulated in order to secure his testimony against Rice. He has sought a judicial reexamination of the weaknesses in the testimony used to corroborate Peak; e.g., the fact that the particles in his clothing could have been other than the remains of ammonia dynamite, the fact that the copper wire was not found at the scene of the bombing, and the weakness in the testimony that his pliers had cut the copper wire. It is difficult to see what more he could have done to make a claim of innocence.

insight into human psychology to recognize that the dynamite and the dynamite particles made a contribution to the credibility of Peak out of all proportion to their probative value. They were precisely the type of evidence more likely to inflame than to enlighten a jury.

If an assertion of societal advantage from suppression is required, then we make it on Mr. Rice's behalf now. We note that Rice's house was searched pursuant to a warrant issued because 1) he belonged to a political organization whose views were obnoxious to the police, 2) other members of that organization had been arrested for a crime, and 3) at a time unknown, a person unknown had supposedly said "that Rice keeps explosives at his residence, and also illegal weapons, which he had said should be used against police officers." App. 9. If a decision in Rice's favor can deter the police, however slightly, from searching a person's home when the only evidence they have is evidence of 1) his political views, 2) wrongdoing by his political associates, and 3) information from nameless, faceless informers of unknown reliability, then society's interests are served.

> "No matter how heinous the crime, the fact of its commission alone is insufficient under our system of jurisprudence to establish the guilt of the accused. The safeguarding of fundamental constitutional rights is a tolerable price to pay for cherished standards of justice." *Rice v. Wolff*, supra, 513 F.2d 1295-1296.

With the omission of one word, Nebraska's summary of this case is accurate. "The present case is a classic example of the reason why search and seizure questions should * * * properly be cognizable in federal habeas corpus." As state trial judge and a state supreme court

upheld an affidavit for a search warrant so wanting in probable cause as to raise the suspicion that the decision upholding it was "a mask", *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).[5] The principle cause shown was activity protected by the First Amendment, *Yates v. United States*, 354 U.S. 298, 318-319 (1957), so that the search trenched on the First Amendment as well as the Fourth, see *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964); *Stanford v. Texas*, 379 U.S. 478

[5]In this case, 188 Neb. 739, 199 N.W.2d 488, the Nebraska Court held that an affidavit for a search warrant could be supplemented in a subsequent suppression proceeding. It repeated that holding in *State v. Dussault*, 193 Neb. 122, 225 N.W.2d 558 (1975). That holding was in direct conflict with *Spinelli v. United States*, 393 U.S. 410 (1969) and *Aguilar v. Texas*, 378 U.S. 108 (1964). Moreover, the Nebraska Supreme Court has been less than disposed to find a want of probable cause in the issuance of a search warrant. See *State v. McCreary*, 139 N.W.2d 362, 179 Neb. 589, cert. denied; *McCreary v. Nebraska*, 86 S.Ct. 1877, 384 U.S. 979, 16 L.Ed. 2d 689 (1966) of *McCreary v. Sigler*, 406 F.2d 1264 (8 Cir. 1969); *State v. Howard*, 167 N.W.2d 80, 184 Neb. 274 (1969); *State v. LeDent*, 185 Neb. 380, 176 N.W.2d 21 (1970), cf. *LeDent v. Wolff*, 460 F.2d 1001 (8th Cir. 1972); *State v. Waits*, 185 Neb. 780, 178 N.W.2d 774 (1970; *State v. Huggins*, 186 Neb. 704, 185 N.W.2d 849 (1971); *State v. Howard*, 197 N.W.2d 641, 188 Neb. 494 (1972); *State v. Bazis*, 190 Neb. 586, 210 N.W.2d 919 (1973); *State v. Torrence*, 192 Neb. 213 (1974); *State v. Glauser*, 193 Neb. 190, 226 N.W.2d 328 (1975). In only a few cases has the Nebraska Supreme Court determined a search warrant to be wanting in establishing probable cause. See *State v. Halloway* 187 Neb. 1, 187 N.W.2d 85 (1971), and *Halloway v. Wolff*, 482 F.2d 110 (8th Cir. 1973); and *State v. Kallos*, 193 Neb. 113, 225 N.W.2d 553 (1975). In *Kallos*, there was a lapse of nine (9) months between the facts alleged to establish probable cause and the issuance of the search warrant.

(1965). These factors demonstrate that there is still a role to be played by the habeas judge whose primary allegiance is to this Court's interpretation of the Constitution, an allegience not weakened by proximity to the enforcement of the criminal law.

C. Any Change in the Scope of Federal Habeas Should be Applied Prospectively Only.

Rice went to the District Court and its jurisdiction under §§2254, rather than to this Court, because in *Fay v. Noia* this Court had indicated that a petition for certiorari was no longer a prerequisite to habeas. 372 U.S. 435-438. The opinions of the District Court and of the court of appeals demonstrate that the decision of the Nebraska Supreme Court was seriously inconsistent with this Court's interpretation of the fourth amendment. Thus, Rice's case was one where certiorari might successfully have been sought. The opportunity to seek direct review here is now gone. If the jurisdiction of the District Court is now to be modified to exclude search and seizure cases, such modification should not be applied in a case such as this. It would be extremely unfair to lead a petitioner to the habeas court upon the grounds that he could obtain there what he could obtain on direct review, only later to tell him that direct review was his only remedy.

CONCLUSION

Nebraska brought this case here to request modification of the exclusionary rule. Its argument is a simple

one: The exclusionary rule frees the guilty; therefore, the exclusionary rule is bad. There is an equally simple answer to this argument: The exclusionary rule protects against unlawful acts by the police, therefore, the exclusionary rule is good. However, simplistic arguments do not solve complex legal problems. The exclusionary rule does bad and it does good. If the good could be retained and the evil eliminated, none would object to the removal of the evil. The unfortunate fact is that there now exists no remedy for violation of Fourth Amendment rights which provides an effective alternative to suppression. While the Fourth Amendment remains in the Bill of Rights, the harm which the exclusionary rule does is the price society pays for the freedom the Fourth Amendment protects.

If history teaches any lesson, it teaches that liberty under law is not a free good. A society that commits itself to the rule of law and freedom of the individual can never expect to have a populace as docile or a social life as peaceful as that prevailing in a state which abandons law and liberty to the total pursuit of order and obedience. While the exclusionary rule imposes costs on society, those costs are part of the price paid for a society in which law binds the government as well as the governed.

Human ingenuity may eventually create an instrument for assuring police compliance with the Fourth Amendment at a lesser cost than imposed by the exclusionary rule. Until such a remedy is developed and proves itself more efficacious than the exclusionary rule, the exclusionary rule must be maintained asn the vindicator of Fourth Amendment rights. Each of Nebraska's proposed modifications of the exclusionary rule substantially impairs the rules ability to defend the

Fourth Amendment. Each proposed modification should be rejected for that reason.

This case was properly brought in federal habeas corpus under 25 U.S.C. §§2254. The construction of §§2254, which brought this case within the scope of federal habeas, is of long standing. That construction is based upon a reasonable interpretation of the history of §§ 2254. That construction is based upon a rational gloss of this Court's case law under §§ 2254. Despite repeated efforts, the Congress has failed to overturn that construction of §§2254. A proper sense of the limits of the judicial function require that modification of §§2254 come from the Congress and not the courts.

The District Court acted within the scope of its jurisdiction. It accurately applied the exclusionary rule and ordered David Rice released or retried. The Court of Appeals for the Eighth Circuit affirmed. Neither the jurisdiction of the District Court nor the exclusionary rule should be modified in this case. Therefore, the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

WILLIAM C. CUNNINGHAM, S.J.
801 Ladera Lane
Santa Barbara, California 93108

J. PATRICK GREEN
707 City National Bank Building
Omaha, Nebraska 68102

Attorneys for Respondent